* Together with:
Co-Operative Legis. Comm v. B&LE No. 638

LIBRARY

Office-Supreme Court, U.S.
FILED
AUG 26 1968
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1968
No. 443

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
THE PENNSYLVANIA RAILROAD COMPANY,
LEHIGH VALLEY RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
THE DELAWARE AND HUDSON RAILROAD CORPORATION, READING COMPANY,
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
WESTERN MARYLAND RAILWAY COMPANY,
ERIE LACKAWANNA RAILROAD COMPANY,
MONTOUR RAILROAD COMPANY,
THE MONONGAHELA RAILROAD COMPANY,
PITTSBURGH, CHARTIER & YOUGHIOGHENY RAILWAY COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

WILLIAM A. GOICHMAN
Assistant Counsel
EDWARD PUNCE
Assistant Counsel
JOSEPH C. BRUNO
Chief Counsel
For Pennsylvania Public Utility Commission

127 North Office Building
Harrisburg, Pennsylvania 17120

Mutsville Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

INDEX

	Page
Petition for Writ of Certiorari:	
Opinions of the Courts Below	3
Jurisdiction	4
Questions Presented for Review	5
Statutes Involved	6
Statement of the Case	7
The Reason for Allowing Certiorari	17
Argument:	
I. Where the Interstate Commerce Commission has either been denied authority over flag protection or has failed to exercise such authority, but has limited its activity in the field to mechanical train control and train stop devices, the states still remain free to make rules and regulations pertaining to flag protection for the safety and health and welfare of its citizens	20
Conclusion	44
Appendix:	
I. Opinion of the Supreme Court	45
II. Order of the Supreme Court	72
III. Portions of Interstate Commerce Act (No. 49 U.S.C. §26)	73
IV. Portions of Public Utility Code	78

TABLE OF CITATIONS

CASES:

Allen-Bradley Local, etc. v. Wisconsin Employment Relations Bd., 315 U.S. 740 32

Atchison Railway v. Railroad Commission, 283 U.S. 380, 391 (1931) 25

Atlantic Coast Line v. Georgia, 234 U.S. 280 .....31, 33

Atlantic Coast Line v. County of Goldboro, 232 U.S. 548 40

Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947) 30

Brotherhood of Locomotive Engineers v. Chicago, R.I. & P. R. Co., 382 U.S. 423, 86 Supreme Ct. 594 (1966) 18, 38

Locomotive Eng. v. Chicago, R.I., 34 Law Week 4109 .32

Brotherhood of Railroad Trainmen v. Baltimore and Ohio Railroad Company, 238 At. 2nd 516 (1968) 41

Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Engineers, etc., The Pennsylvania Railroad Company and Pennsylvania Reading Seashore Lines v. Board of Public Utility Commissioners, Dept. of Public Utilities and Brotherhood of Railway Trainmen et al., 49 N.J. 174, 229 At. 2nd 505 (1967) 27, 41

California v. Zook, 336 U.S. 725, 69 Supreme Ct. 841 (1949) 18, 26, 29, 37

Campbell v. Hussey, 368 U.S. 310, 311 .....27, 30

Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714, 83 Supreme Ct. 1022 (1963) 18, 34, 35, 37

Public Service Commission Docket 440 of the State of Delaware 42

Eicholz v. Public Service Commission of Missouri, 306 U.S. 268, 273 31

Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 431, 83 S. St. 1759 (1963) 36

Huron Portland Cement Company, etc. v. City of Detroit, Michigan, etc. et al., 362 U.S. 440 (1960) 38

Illinois Public Service Commission (Case 5097) 42, 43

International-Great Northern Railroad Company and Ewing Norwood and A. F. Fisher v. Railroad Commission of Texas, 275 U.S. 503, affirming 1927 per curiam (281 S.W. 1084 (Dec. 1926)) .. 39

Kelly v. Washington, 302 U.S. 1, 10 .....31, 37

Maurer v. Hamilton, 309 U.S. 598, 614 (1939) 34

McDonald v. Thompson, 305 U.S. 263 31

Mintz v. Baldwin, 289 U.S. 346, 350 32

Monongahela Connecting Railroad Company v. Pa. P.U.C., 373 F. 2d 142, 17 A.L.R. (3rd Cir. 1967) 33

Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 47 S. Ct. 207 (1926) 27, 29

Nashville, Chattanooga & St. Louis Railway v. White, Administrator et al., 278 U.S. 456 40

Pennsylvania R. v. Public Service Commission of Pennsylvania, 250 U.S. 566 (1919) 27

Rice v. Santa Fe Elevator, 368 U.S. 313 29

Smith v. State of Alabama, 124 U.S. 465 .....33, 34, 40

Southern Pacific Co. v. State of Arizona ex rel. Sullivan, 325 U.S. 761, 766, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945) 26, 27, 32

Terminal Assn. v. Trainmen, 318 U.S. 1, 4-5 (1942) 27, 31, 33

United States v. Pennsylvania R.R. Co., 242 U.S. 208, 229 24

Welch Co. v. New Hampshire, 306 U.S. 79 31

West Virginia Public Service Commission (Case 6024) 43

STATUTES:

28 U.S.C. 1257(3) 4

Interstate Commerce Act, Section 25, Part 1, 49 U.S.C. Section 26 .....5, 6, 19, 20, 21, 23, 24, 25, 39, 43, 44

Pennsylvania Public Utility Law, Act of May 28, 1937, P. L. 1053 (66 P.S. Anno.):

Section 401 (P.S. §1171) 6

Section 413 (P.S. §1183) 6

Section 901 (P.S. §1341) 6

Section 902 (P.S. §1342) 6

OPINIONS:

210 Pa. Superior Ct. 7, 230 A. 2d 220 (1967) 3

430 Pa. Supreme Ct. 339 (1968), A 2d (1968) 3

MISCELLANEOUS:

81 Congressional Record 9012, 9013, 9014 22

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1968

No.

Pennsylvania Public Utility Commission,
Petitioner

v.

Bessemer and Lake Erie Railroad Company,
The Pennsylvania Railroad Company,
Lehigh Valley Railroad Company,
The New York Central Railroad Company,
The Baltimore and Ohio Railroad Company,
The Delaware and Hudson Railroad Corporation,
Reading Company,
The Central Railroad Company of New Jersey,
The Pittsburgh and Lake Erie Railroad Company
Western Maryland Railway Company,
Erie Lackawanna Railroad Company,
Montour Railroad Company,
The Monongahela Railroad Company,
Pittsburgh; Chartiers & Youghiogheny Railway Company,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Pennsylvania Public Utility Commission, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above cause.

OPINIONS OF THE COURTS BELOW

The opinion of the Superior Court of Pennsylvania is reported at 210 Pa. Superior Ct. 7, 230 A. 2d 220 (1967).

The opinion of the Supreme Court of Pennsylvania is reported at 430 Pa. 339, A. 2d (1968) and attached hereto as Appendix I, and the order of the Supreme Court of Pennsylvania denying the petition of the Pennsylvania Public Utility Commission for reargument is attached hereto as Appendix II.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on May 21, 1968. The order of the Supreme Court of Pennsylvania denying the petition of Pennsylvania Public Utility Commission for rehearing was entered on July 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED FOR REVIEW

1. Did the Supreme Court of Pennsylvania err in holding that Section 25 of the Interstate Commerce Act, 49 U.S.C. Section 26, dealing with the installation of mechanical devices to prevent rear-end train collisions, completely occupied the field and preempted all state regulation dealing with flag protection?

STATUTES INVOLVED

Section 25, Part I of the Interstate Commerce Act, as amended, 49 U.S.C. §25, 49 U.S.C.A. §26 (printed at length in Appendix III, attached hereto and made part hereof).

Sections 401, 413, 901, 902 of the Public Utility Code, 66 Purdon's Stat. Ann. §§1171, 1183, 1341, 1342, Act of May 28, 1937, P. L. 1053 (printed at length in Appendix IV, attached hereto and made part hereof).

STATEMENT OF THE CASE

On October 26, 1964, the Cooperative Legislative Committee, Railroad Brotherhoods in the Commonwealth of Pennsylvania, C. J. Sludden, W. P. Fullerton and W. D. Smith, on their own behalf and as representatives of their respective brotherhoods and the constituent lodges of such brotherhoods in the Commonwealth of Pennsylvania, filed a petition (the Pennsylvania Public Utility Commission gave the petition a docket number, Docket P. 7) with the Pennsylvania Public Utility Commission (hereinafter "Commission") requesting that the Commission:

> ". . . promulgate a regulation or regulations requiring that a member of the crew must go back immediately with proper flagging equipment a sufficient distance to insure full protection when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab, automatic block or manual block signal system rules."

Answers to the petition were filed by the majority of the railroads operating within the Commonwealth of Pennsylvania including the respondents in the above case who were appellants in the state courts.

Immediately before this, a complaint had been filed with the Commission on July 22, 1964, by the Cooperative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, Lester F. Gray, W. C. Livengood and W. L. Whitney, individual employees, against the Pitts-

burgh and Lake Erie Railroad Company ("P. & L. E.") seeking an order directing P. & L. E. to reinstitute adequate and proper flag protection upon its system within Pennsylvania. Hearings were held on that complaint on four separate days concluding on January 18, 1965. So far as the petition was concerned (Docket P. 7) hearings were held by the Commission in Harrisburg on February 8, 9 and 10, March 8, 9, 10, 11, 12, 29 and 30, 1965; and in Philadelphia on April 13, 14, 15 and 23, 1965. The Brotherhoods presented witnesses from the railroads: The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware and Hudson Railroad Corporation, Erie Lackawanna Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company, and Reading Company. The carriers presented witnesses from the above named Railroads and, in addition, witnesses from the Bessemer and Lake Erie Railroad Company, The Pittsburgh and Lake Erie Railroad Company, and the Pittsburgh, Chartiers and Youghiogheny Railroad Company, and the Union Railroad Company.

After the filing of briefs, oral argument was heard by the Commission on July 27, 1965.

On November 22, 1965, the Commission issued similar orders in Docket P. 7 and Complaint Docket 18018. The petition in P.7 had alleged that the railroads, for many years prior to the filing of the petition, had an operating rule known as "Rule 99," which allegedly provided that when a train stopped under circumstances in which it might be overtaken by another train, a member of the crew was required to go back immediately with flagging equipment a sufficient distance to insure full protection. It was further alleged that some of the railroads had

recently changed their flagging rules to make them non-applicable to trains operating under locomotive cab signal system rules, automatic block signal system rules and manual block signal system rules, although it was alleged that under all such systems, trains might be overtaken by following trains. The petition further alleged that such action by the railroads created an unreasonable risk of harm to train crews and, in the case of passenger trains, to the travelling public.

The Public Utility Commission, in its November 22, 1965 order, after a comprehensive study of the facts, made the following order:

> "Upon full consideration of the matters and things involved, we are of the opinion and find that the elimination of flag protection against following trains, as has been effectuated by various carriers in Pennsylvania during recent months, by the revision of the operating rules governing flagging, has decreased the degree of safety available to the public and to railroad employees, and that continued adherence to the 'no flagging' practice would seriously impede efforts to increase railroad safety and serve to decrease the margin of safety provided for rail operation; therefore,
>
> "IT IS ORDERED:
>
> "1. That the prayer of Petition No. 7 be granted.
>
> "2. That the motion to dismiss the petition filed March 26, 1965 by the Pittsburgh and Shawmut Railroad Company be denied.
>
> "3. That all railroads operating in the Commonwealth of Pennsylvania, within 30 days of service

hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees so as to require that flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment, for trains moving on main or secondary tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circumstances in which they may be overtaken by following trains, in manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories, except within the limits of interlocking plants, at stations where passenger trains are making normal station stops, within the limits of a classification or storage yard and manual block territory protected by an absolute block.

"NOTE: When trains are operating under automatic block signal system rules (locomotive cab signal or centralized traffic control signal rule), the requirements of flagging, insofar as protecting against following trains is concerned will have been complied with when full protection is afforded against trains moving at restricted speed.

"4. That the above requirement be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof."

Upon following the issuance of the orders, the respondents placed the order into their railroad regulations as new Rule 16 and filed appeals with the Superior Court of Pennsylvania. Upon the Commission's petition, the Superior Court remanded the record to the Commission

concerning its orders of November 22, 1965 at Dockets P. 7 and C. 18018. Further hearings were held by the Commission on May 12, 1966 and July 7, 1966. The proceedings at Dockets P. 7 and C. 18018 were consolidated for the purpose of these hearings. The Commission by order dated December 19, 1966, then issued a consolidated order as follows:

> "Furthermore, upon review of the supplemented record and reconsideration of all pertinent facts contained therein and the pleadings of the various respondents, we are convinced that our finding, as propounded in the November 22, 1965 order; viz., that the safety of the public and of railroad employees requires flag protection under all circumstances, when a train is stopped or when a train is moving under circumstances in which it may be overtaken by another train, is reasonable and well supported by the record, that the basic requirements of our order are in the general interest of the public and should not be materially disturbed. However, in order to eliminate the apparent confusion and misinterpretation of certain diction used in our existing order, flagging should be performed on main tracks, secondary tracks, or on any tracks used for the movement of trains, where a train, stopped or moving, may be overtaken by another train, whether within a yard proper; adjacent to the entrance to a yard; or in areas designated by a railroad as yard limit territory.
>
> "In the circumstances, and being satisfied that the proposed changes are in the interest of safety, and in the public interest generally, we find and determine that our order issued November 22, 1965 in the Petition 7 proceeding should be modified and it

also follows that our findings in C. 18018 should be modified. We are further of the opinion and find that the proper rule to be placed in effect and rigidly enforced and adhered to is Rule 99 as it existed prior to 1945; Therefore,

"It Is Ordered:

"1. That numbered Paragraph 3 on page 13 of our order issued at P. 7, November 22, 1965, which reads as follows, to wit:

> " '3. That all railroads operating in the Commonwealth of Pennsylvania, within 30 days of service hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees so as to require that flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment, for trains moving on main or secondary tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circumstances in which they may be overtaken by following trains, in manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories, except within the limits of interlocking plants, at stations where passenger trains are making normal station stops, within the limits of a classification or storage yard and manual block territory protected by an absolute block.
>
> " 'Note: When trains are operated under automatic block signal system rules (locomotive cab signal or centralized traffic control signal

rule), the requirements of flagging insofar as protecting against following trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed.'

be and is hereby modified to read as follows:

"3. That all railroads operating in the Commonwealth of Pennsylvania, within 45 days of service hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees in conformity with the following:

'(a) When a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and/or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail and when necessary, in addition, display lighted fusees.

"(b) When recalled and safety to the train will permit, he may return.

"(c) When conditions require, he will leave the torpedoes and a lighted fusee.

"(d) The front of the train must be protected in the same way, when necessary, by a member of the crew.

"(e) When a train is moving under circumstances in which it may be overtaken by another train, a member of the crew must take such action as may be necessary to insure full protection. By night (or by

day, when the view is obscured) lighted fuses must be dropped off the moving train or displayed at proper intervals.

"(f) When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used.

"(g) Conductors and enginemen are responsible for the protection of their trains.

"(h) When a pusher engine is assisting a train, coupled behind the cabin or caboose car, and the member of the crew who protects the rear-end of the train is riding in the cabin or caboose car, the requirements as to the use of fusees will be met by dropping them off between the cabin or caboose car and pusher engine on the track the train is using, and not between that track and an adjacent track.

"2. That numbered paragraph 4 on page 13 of our order issued at P. 7, November 22, 1965, which reads as follows, to wit:

"'4. That the above requirement be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof.'

be and is hereby modified to read as follows:

"4. That the above-revised paragraph 3 be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof.

"3. That numbered paragraph 2 on page 18 of our order issued at C. 18018, November 22, 1965, which reads as follows, to wit:

> "'2. That The Pittsburgh and Lake Erie Railroad Company forthwith require that passenger and freight trains on its line of railroad within the Commonwealth be operated in a manner consistent with Rule 16 of the Commission's Railroad Regulations.'

be and is hereby modified to read as follows:

> "2. That The Pittsburgh and Lake Erie Railroad Company forthwith require that passenger and freight trains on its line of railroad within the Commonwealth be operated in a manner consistent with Rule 16 of the Commission's Railroad Regulations as revised this date.
>
> "4. That in all respects not inconsistent herewith, our orders issued November 22, 1965, at P. 7 and at C. 18018, remain in full force and effect, and that the record herein be returned to the Superior Court of Pennsylvania forthwith."

Following the Commission's order of December 19, 1966, additional appeals were taken by several of the respondents. All of the appeals were now consolidated for argument before the Superior Court. After extensive oral argument, the Superior Court, on May 17, 1967, issued orders refusing the petitions filed by respondents for supersedeas and stay, and, also, denied the Commission's motion to quash the appeals on the ground that the appeals were from the rule making powers of the Commission and, hence, were not appealable. On June 16, 1967, the Superior Court filed its opinion affirming the orders of the Commission.

The railroads then filed their petition with the Pennsylvania Supreme Court for Allowance of Appeal, and

that petition was granted, but limited solely to the question of Federal preemption. After additional briefing and oral argument, the Pennsylvania Supreme Court, in a vote of 4 to 3, on May 21, 1968 reversed both the orders of the Superior Court and the Pennsylvania Public Utility Commission on the ground that the orders of the Pennsylvania Public Utility Commission had been completely preempted by Section 25 of the Interstate Commerce Act, 49 U.S.C. §26. The majority opinion was written by Mr. Justice Roberts for the Court, consisting of Justices Bell, Jones and O'Brien, Mr. Justice Cohen filed a dissenting opinion in which Mr. Justice Eagen joined, and Mr. Justice Musmanno filed a dissenting opinion. The Cooperative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania and certain named individuals were permitted to intervene and to make oral argument and file briefs before the Superior and Supreme Court.

THE REASON FOR ALLOWING CERTIORARI

The Supreme Court of Pennsylvania has decided a Federal question of considerable substance in a manner which does not accord with applicable decisions of this Court and which concerns a substantial issue of safety throughout the entire United States.

The majority opinion held that because the Interstate Commerce Commission is given the authority to order the installation of mechanical devices to help stop and control train movements on the same track so as to prevent rear end collisions, the states no longer have any authority to make necessary rules and regulations for use of manual flagging by flagmen, who would be used under conditions found to be necessary for the safety, health and welfare of the citizens.

While the Interstate Commerce Commission has developed an efficient system for the control and supervision of the installation of mechanical devices under Section 25, the Interstate Commerce Commission has taken no action concerning flagging, which has traditionally been regulated by the states.

The majority opinion recognizes that neither the Interstate Commerce Commission nor the Department of Transportation has ever issued any regulations covering flag protection and, yet, notwithstanding this nonexercise, holds that the State of Pennsylvania is without authority to require flag protection.

The majority opinion holds that Section 25 of the Interstate Commerce Act impliedly empowers the Inter-

state Commerce Commission to make rules pertaining to flag protection, and, although it has not, the "silence of Congress" doctrine operates to "occupy the field" so as to preempt state regulation.

Your petitioner submits that under these circumstances, there is no such preemption, there is no Federal exercise of power to which the state exercise of power is inconsistent, and whether or not the Interstate Commerce Commission is authorized to issue flagging, since it has not done so, state regulation can stand. Moreover, Section 25 of the Interstate Commerce Act has not empowered the Interstate Commerce Commission to regulate manual flag protection.

The majority opinion of the Pennsylvania Supreme Court is in conflict with decisions of the highest court in other states as well as state administrative bodies, and overlooks many pertinent decisions of your Honorable Court dealing with the question of preemption which make it clear that the actions of the state in the instant case cannot be held to have been superseded or preempted. See, for example,

Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co., 382 U.S. 423, 86 S. Ct. 594 (1966);

Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714, 83 S. Ct. 1022 (1963);

California v. Zook, 336 U.S. 725, 69 S. Ct. 841 (1949).

The majority opinion creates a gap in the field of safety by nullifying state authority which has traditionally

existed in the field and to which the Interstate Commerce Commission has given due deference.

The Honorable Robert W. Ginnane stated, in correspondence appended to the briefs in the State Supreme Courts, that the Interstate Commerce Commission "has never formally construed Section 25 of the Interstate Commerce Act, 49 U.S. Code 26, as including such flag protection."

The letter of H. R. Longhurst, Acting Director of the Bureau of Railroad Safety for the Department of Transportation stated: "The manner in which flag protection is provided is an operating matter over which we do not exercise jurisdiction."

The conclusion by the majority opinion that state regulation is null and of no effect is not in accordance with applicable decisions of this Court, is not compelled by logic, is not supported by reason, and is directly contrary to the welfare and well-being of the country, and, hence, is erroneous and should be reversed.

ARGUMENT

I.

Where the Interstate Commerce Commission Has Either Been Denied Authority Over Flag Protection or Has Failed To Exercise Such Authority, but Has Limited Its Activity in the Field to Mechanical Train Control and Train Stop Devices, the States Still Remain Free To Make Rules and Regulations Pertaining to Flag Protection for the Safety and Health and Welfare of Its Citizens

A. The Interstate Commerce Commission has no jurisdiction to prescribe flagging or flag protection.

The majority opinion of the Supreme Court of Pennsylvania states that the Interstate Commerce Commission, by Section 25 of the Interstate Commerce Act, 49 U.S.C. §26, has conferred authority upon the Interstate Commerce Commission to regulate flag protection of interstate trains. The opinion states that:

> ". . . flagging can certainly be classified as either a 'method' or a 'system' ".

The history of the train control act, as it is popularly known, does not bear out the Court's statement.

The original act was passed in 1920 with the Transportation Act of 1920 and was the result of a number of years of investigation by Congress into mechanical

devices which could automatically halt trains travelling on the same track in order to prevent a rear end collision. A reading of the committee reports and the legislative debates reveals very little discussion of Section 25 of the Act, since there was general agreement that such mechancial devices were needed. There is no mention made any place concerning the need for Federal control of flag protection!

While the act was amended several times procedurally for minor reasons, the major amendment came by the Act of August 26, 1937, 50 Stat. 39. By that amendment, Congress conferred the authority upon the Interstate Commerce Commission to deal not only with automatic train control devices, which was the only mechancial device mentioned in the 1920 Act, but conferred authority upon the Interstate Commerce Commission to deal also with other devices, such as block-signal systems, cab-signal systems, and interlocking-railway crossing devices. The discussion of this amendment in the Congressional record makes it crystal clear that Section 25 of the Interstate Commerce Act concerns only the installation of mechanical devices.

For example, Representative Martin of Colorado, who was asked to be the spokesman for the Interstate Commerce Committee on the floor, stated as follows:

> "As I understand the legislation, it involves principally what is known as the block signal system, which operates and controls train movements over the railways by signals instead of by telegraphic orders, delivered to trainmen. There is also an interlocking provision of the bill, and that simply refers to interlocking railway crossings where railways cross

each other. Also, the bill refers to cab-signal devices. . . ."

81 *Cong. Rec.* 9012-9013.

Representative Martin also said as follows:

"Mr. Speaker, all we are doing under this legislation is extending the authority of the Interstate Commerce Commission to inspect signal equipment and to coordinate the different signal apparatus that are now being used by the standard railroads throughout the United States."

81 *Cong. Rec.* 9014.

By this amendment, Congress provided that the Interstate Commerce Commission has jurisdiction over ". . . other similar appliances, methods and systems intended to promote the safety of railroad operation . . ." Congress, by this overall clause, wanted to prevent the type of thing that necessitated the 1937 amendment, namely, the making of an amendment to cover a new device or mechanical system that would come into being. At no time, in any of the debates or committee reports, is there any reference to flag protection. The catchall phrase "other similar appliances, methods and systems" must be viewed under the doctrine of *ejusdem generis* and limited to the type of mechanical devices previously specified in the act, which certainly would not cover manual flag protection. The majority opinion of the Supreme Court of Pennsylvania classifying manual flagging as a "method" or "system" under the act ignores the background and legislative history of the legislation.

It may be noticed that flag protection in the railroad industry was well-known in 1920 as well as 1937. Such

protection in 1920 constituted the basic form of protection the railroads offered against rear end collisions. Yet, Congress did not mention it by name when conferring authority upon the Interstate Commerce Commission to prevent rear-end collisions by Section 25. The only conclusion to be drawn from this is that Congress intended such flag protection to continue to be regulated by the states. To draw the conclusion that Congress, by not mentioning flag protection in Section 25, thereby sought to remove flag protection as a means of preventing rear end collisions would be absurd! Yet, the Supreme Court of Pennsylvania says just this when it says:

> "The first reason for our decision today, that Section 25 devices perform the same function as flagging, needs little expansion . . . Congress having once determined how best to avoid this type of disaster [namely, rear end collisions], it is no longer open to the states to decide that the federal protections are inadequate and that additional safety measures might be taken by interstate railroads whenever their trains run through Pennsylvania."

The Court then contradicts itself by pointing out that "flagging" is a "method" or "system" embraced within Section 25. If mechanical devices perform the same function as "flagging," why would Congress confer both powers on the Interstate Commerce Commission? Moreover, the canons of judicial construction chasten against using such words as "system" or "method" to enlarge powers never intended.

Your Honorable Court has frequently been called upon to interpret general words, and, invariably, the Court has limited any far reaching interpretation. For example,

in *United States v. Pennsylvania R.R. Co.*, 242 U.S. 208, 229, the Court said in interpreting the word "practice":

> "Following a well known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates."

In the latter case, the Court noted the danger of using a term "ambushed in obscurity" and involving a construction "that could be disputed and was disputed" and which would turn "accepted custom into delinquency", 242 U.S. 229.

If the Interstate Commerce Commission had authority to regulate flag protection, its failure to do so up until now would seem to be a delinquency on the Commission's part. As previously noted, however, the Commission has never interpreted Section 25 to give it jurisdiction over flag protection.

The Court in the *Pennsylvania Railroad* case makes it clear that Congress usually covers the subject of safety by careful, specific rules, noting the Safety Appliance Act as an example. Ironically, the Court indicates that the Train Control Act was not encompassed within the term "practice." The majority opinion of the Pennsylvania Supreme Court is therefore in error in holding that flag protection is encompassed within Section 25.

It may be noted in passing that while the Interstate Commerce Commission has adverted in several orders to Rule 99 of the railroads' regulations which provide for flagging, the Interstate Commerce Commission never made any orders concerning flag protection, what flag protection consists of, how it is to be done, when it is to

be done, etc., leaving this entirely to the States and the railroads to work out among themselves.[1]

The first question which must be answered in this case is whether Congress has conferred the power to prescribe flag protection upon the Interstate Commerce Commission. For the reasons set forth above, we submit it has not.

B. There is no "silence of Congress" preemption.

Its failure to do so is not a mandate that the States were not to legislate on flagging. In fact, the opposite conclusion is more reasonable and likely.

Your Honorable Court has rejected many times innuendoes of preemption by silence. For example, in *Atchison Railway v. Railroad Commission,* 283 U.S. 380, 391 (1931), a party argued:

> "That is, that it was the intention of Congress to prevent the exercise of state power in this matter of serious public interest, **although no authority was given to the federal commission to meet the public need.** Such an intention to override existing state authority to deal with local exigencies is not to be im-

---

[1] Flagging is not all by hand signals but can be done by torpedoes, fuses, and similar methods. Flagging may be the only means of protection on a railroad where the train is halted or stopped outside of any signal system. The Pennsylvania Public Utility Commission requires flagging, more importantly, outside of automatic-block and manual block territories, areas that the I.C.C. could not conceivably protect under Section 25. Yet, the Pennsylvania Supreme Court holds state regulation superseded, even in these areas.

puted to the Congress unless its enactment compels that conclusion."

Your Honorable Court has made it clear that preemption from Congressional silence must be determined by the "conflicts" rule. In *California v, Zook,* 336 U.S. 728 (1949), your Honorable Court stated:

> "Certain first principles are no longer in doubt. Whether as inference from Congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the Cooley case's broad delineation of the areas of state and national power over interstate commerce." (Citations omitted.)
>
> • • • • • • • •
>
> "But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the State action conflict with national policy? The Cooley rule and its later application, Southern Pacific Co. v. State of Arizona ex rel. Sullivan, supra, the question of congressional 'occupation of the field,' and the search for conflict in the very terms of state and federal statutes are but three separate particularizations of *this* initial principle."

The Court then goes on to explain in the *Zook* case that the "coincidence" rationale is ". . . only an application of the first principle of conflict with national policy."

The Court noted that the intent to displace local laws "must be clearly manifested" (citing cases) and that the conflict necessary to vitiate state laws must be "clear."

There is no conflict here, let alone a "clear" conflict. Flagging, as ordered by the Pennsylvania Commission,

does not impair or interfere with the operation of the automatic-block or manual-block systems. The Pennsylvania Supreme Court recognized that the order of the Pennsylvania Commission was supplementary, but, nevertheless, relied upon the *Napier* case and the *Pennsylvania R. v. Public Service Commission of Pennsylvania,* 250 U.S. 566 (1919), both of which are distinguishable and have been limited considerably by later cases.

For example, in *California v. Zook,* 336 U.S. 725, 729 (1949), the Court indicated that such mechanical formulations as "coincidence is as ineffective as opposition" are not to be taken literally. The Court indicated that each case must be judged on its facts, and that the "conflicts" test is really the criterion to be applied.

The New Jersey Court, in the *Complaint of Brotherhood of R.R. Trainmen; Pennsylvania Railroad v. The Board of Public Utilities of New Jersey,* 49 N.J. 174, 229 A. 2d 505, 509 (1967), properly notes that:

> "Napier has never been applied as broadly as the Railroads contend (cf. Terminal R. Assn. of St. Louis v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 4; 63 S. Ct. 420; 87 L. Ed. 571, 576 (1943); Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 766; 65 S. Ct. 1515, 89 L. Ed. 1915, 1922 (1945)); in any event, it dealt, not with a supplemental local emergency safety device, such as flagging, but with equipment attached to the locomotive which passes through from state to state and with respect to which the national interest in uniformity is vital and paramount."

Your Court, in *Campbell v. Hussey,* 368 U.S. 310, 311, 312, 82 S. Ct. 327 (1961), makes clear that formulations

of a mechanical nature cannot decide concrete cases. For example, the Court said:

"... The Court makes no attempt to relate this fact to the issue in this case and show just how this congressional purpose supports an inference that Congress intended to preclude the States from requiring that the 'uniform standards of classification' so established and applied by official federal inspection be disclosed on each lot of tobacco sold. Instead the Court proceeds from the bare fact of congressional legislation to the conclusion of federal pre-emption by application of a mechanistic formula which operates independently of congressional intent. That formula, as stated by the Court, is that 'complementary state regulation is as fatal as state regulations which conflict with the federal scheme.' I know of no case in which this formula has previously been applied by this Court. Certainly, the three cases which it cites do not support its action here.

"Missouri Pacific R. Co. v. Porter, the first case cited by the Court, did make the statement that state laws 'cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.' But this statement was made only after the Court had discussed the congressional act involved there in great detail and found Congress to have concluded that 'no other regulation is necessary.' That the Court in Missouri Pacific did not intend to go outside of the facts there before it and lay down a rule of automatic pre-emption by 'coincidence' is plainly shown by the authorities relied upon to support

its passing reference. The first case cited, Napier v. Atlantic Coast Line R. Co., is typical. In Napier, Mr. Justice Brandeis, in his usual careful way, declared that in considering the question of pre-emption '*The intention of Congress to exclude States* from exercising police power must be clearly manifested * * *.' The Missouri Pacific case can therefore support pre-emption only upon the basis of congressional intent and does not lend the slightest support to the mechanistic pre-emption rule which the Court applies here."

The Court in *Campbell* goes on to distinguish any such misinterpretation of certain language in *Rice v. Santa Fe Elevator* case, and states, as follows (368 U.S. 313):

> "Far from supporting the mechanical formula used by the Court here to declare Georgia's law unconstitutional, Santa Fe Elevator stands as a clear refutation of that formula, and contains a very clear statement of the proper rule which before today has governed this Court's holdings on pre-emption—the rule that pre-emption of the historic police powers of the States can be found only where 'that was the clear and manifest purpose of Congress.' "

The Court clearly reaffirms the doctrines set forth in *California v. Zook* (368 U.S. 314), and also quotes from Justice Holmes, but in a manner conveying the opposite meaning than that given by the majority opinion of the Pennsylvania Supreme Court (see 368 U.S. 314). The Pennsylvania Supreme Court in the same mechanical fashion disapproved of in the *Campbell* case, says in this case:

> " 'When the United States has exercised its exclusive powers over interstate commerce as far as to

take possession of the field, the States no more can supplement its requirements than they can annul them' ". (403 Pa. 347).

Your Honorable Court has clearly spelled out that this mechanistic formula (which Justice Roberts applied for the court below in this case) is nothing "but a dissenting view." (368 U.S. 315).

Your Honorable Court in *Campbell v. Hussey,* supra, even makes it clearer that reliance upon certain isolated statements of Justice Holmes for a mechanistic formulation of preemption is misplaced, and that Justice Holmes stands for a judgment upon the particular case (368 U.S. 314). The Pennsylvania Supreme Court, in relying upon the remarks of Justice Holmes that supplementary legislation by States is ineffective was unaware of the limitations your Honorable Court had placed on these scattered remarks in previous cases. See, e.g., *Bethlehem Steel Co. v. New York State Labor Relations Bd.,* 330 U.S. 767, 783 (1947) and *Campbell v. Hussey,* supra.

In the *Campbell* case, your Honorable Court cites a list of cases in footnote 29 for the proposition that the historic police powers of the States are not superseded unless there is a clear and manifest purpose and these cases ". . . plainly show that this Court has consistently rejected the idea that every time Congress passes a law, all State laws touching on the same subject are automatically destroyed." (368 U.S. 315).

C. Assuming, arguendo, that Section 25 authorizes the I. C. C. to regulate flagging, the unexercised power by the I. C. C. does not oust states action.

Even if it be assumed, arguendo, that Section 25 authorizes the Interstate Commerce Commission to make rules pertaining to flag protection, the fact remains that no such rules have been made and the law has been well settled in such a case that until the Interstate Commerce Commission acts, the state is free to act.

Eicholz v. Public Service Commission of Missouri, 306 U.S. 268, 273;

Welch Co. v. New Hampshire, 306 U.S. 79;

McDonald v. Thompson, 305 U.S. 263.

In *Terminal Assn. v. Trainmen,* 318 U.S. 1, 4-5 (1942), your Honorable Court stated along the same lines:

> "At least in the absence of such action, these Acts do not themselves preclude the state order, Atlantic Coast Line v. Georgia, 234 U.S. 280. cf. Welch Co. v. New Hampshire, 306 U.S. 79."

In a long line of cases your Court has indicated that it is the actual conflict with the exercise of power by the Interstate Commerce Commission which nullifies state action and not the latent authority on the part of Congress. For example, in *Kelly v. Washington,* 302 U.S. 1, 10, your Honorable Court stated:

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is super-

seded **only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'** "

In *Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board,* 315 U.S. 740, 749, it was stated:

"We will not **lightly infer** that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

In *Southern Pacific Co. v. Arizona,* 325 U.S. 761, at 766, it is stated:

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested [cases cited], or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. [Cases cited]."

In *Mintz v. Baldwin,* 289 U.S. 346, 350, it is stated:

"The purpose of Congress to supersede or exclude state action against the ravages of the disease is not **lightly** to be **inferred.** The intention to do so must definitely and clearly appear."

In the *Brotherhood of Locomotive Engineers v. Chicago, R. I.,* 382 U.S. 423, 86 S. Ct. 423 (1966), the Supreme Court said:

"In the absence of congressional legislation on that subject, however, the *States have extensive power*

of their own to regulate in this field, particularly to protect the safety of railroad employees and the public.'' (Emphasis supplied.)

In *Monongahela Connecting Railroad Company v. Pa. P.U.C.*, 373 F. 2d 142, 17 A.L.R. 3d 271 (3rd Cir. 1967), the 3rd Circuit Court ruled that the Public Utility Commission had jurisdiction to order the railroad to attach air brakes to an intrastate movement notwithstanding the Safety Appliance Act applies to railroads engaged in moving interstate traffic. Since the Safety Appliance Act would not apply to an intrastate movement, it held that the states still retained that power of action. On this point the Court said as follows:

> ''Where federal legislation admits of a gap the state may pass appropriate laws, to take care of needed protection, which do not conflict with their federal counterparts, Atlantic Coast Line v. Georgia, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914); Terminal Assn. v. Trainmen, 318 U.S. 1, 63 S. Ct. 420, 87 L. Ed. 571 (1943). The hot metal movement, because of its position in relation to the Safety Appliance Act and its extremely hazardous nature, comes within the sphere of appropriate state regulation. In Smith v. Alabama, 124 U.S. 465, 8 S. Ct. 564, 31 L. Ed. 508 (1888), the Court stated:
>
> 'It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and

the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards and precautions.

* * * * * * * *

'The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not per se regulations of commerce; it is only when they operate as such in the circumstances of their application, and **conflict** with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.' " (124 U.S. 465 at 481, 482.)

Your Honorable Court has consistently stated that "when public safety and health are concerned", Congressional intention to displace local laws is not to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. *Maurer v. Hamilton,* 309 U.S. 598, 614 (1939).

In a series of recent cases your Honorable Court has set forth the rules to be applied on the question of preemption. For example, in the case of *Colorado Anti-Discrimination Commission et al. v. Continental Air Lines, Inc.,* 372 U.S. 714, 83 S. Ct. 1022 (1963), your Honorable Court held that the Colorado Supreme Court was *in error*

in holding that the Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958, had pre-empted state legislation on the same subject, the protection of people flying in interstate commerce from racial discrimination. Your Honorable Court held in that case (which is almost on all fours with the instant case) that the Colorado Supreme Court was in error and that it had not applied the proper rules of interpretation. More particularly your Honorable Court pointed out that so long as any Federal power may remain "dormant and unexercised", it will not frustrate any part of the purpose of the federal legislation, and that state laws on the subject can stand. The majority opinion of the Pennsylvania Supreme Court overlooked this doctrine and hence came to a wrong conclusion. This case being very apropos of the instant case, we quote the following discussion on the question of supersession (372 U.S. at 722 et seq.) (footnotes omitted):

> "Continental argues that federal law has so pervasively covered the field of protecting people in interstate commerce from racial discrimination that the States are barred from enacting legislation in this field. It is not contended, however, that the Colorado statute is in direct conflict with federal law, that it denies rights granted by Congress, or that it stands as an obstacle to the full effectiveness of a federal statute. Rather Continental argues that:
>
> 'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'

"But this Court has also said that the mere 'fact of identity does not mean the automatic invalidity of State measures.' To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here."

* * * * * * * * *

"The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much which has been exercised by regulations. Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938 and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the federal legislation."

Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 431, 83 S. Ct. 1759 (1963) is to the same effect. For example, the Court there said as follows (374 U.S. 429-430):

"In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to the broad statements about the 'Comprehensive' nature of federal regulation under the Federal Communications Act. The

'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case.' Statements concerning the 'exclusive jurisdiction' of Congress being the only controversial question: whether Congress intended to make its jurisdiction exclusive. People of State of California v. Zook, 336 U.S. 725, 731, 69 S. Ct. 841, 844, 93 L. Ed. 1005. Kelly v. State of Washington ex rel. Foss Co., 302 U.S. 1, 10-13, 58 S. Ct. 87, 82 L. Ed. 3. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 141, 83 S. Ct. 1210, 1217."

"Finally, there has been no showing of any conflict between this state law and the federal regulatory system, or that the state law stands as an obstacle to the full effectiveness of the federal statute. No specific federal regulations even remotely in conflict with the New Mexico law have been called to our attention. The Commission itself has apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it. As in Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, at 724, 83 S. Ct. 1022, at 1027, we are satisfied that the state statute 'at least so long as any power the [Commission] may have remains "dormant and

unexercised," will not frustrate any part of the purpose of the federal legislation.' "

In the recent case of *Brotherhood of Locomotive Engineers et al. v. Chicago, Rock Island and Pacific Railroad Co. et al.*, 382 U.S. 423 (1966) this Court reversed the lower court which had found that the Arkansas law would frustrate and present an actual conflict with the Federal Arbitration Act. The three-judge District Court held that the parties could not comply both with the State law and the arbitration award. Nonetheless, the Supreme Court held that there was no supersession on the ground that there was no impasse in the collective bargaining process in those states which had the Full Crew Act. The U. S. Supreme Court found no intention to supersede the Full Crew Act laws. This case again shows the overall perspective that the Court is taking in supporting state action.

In the case of *Huron Portland Cement Company, etc. v. City of Detroit, Michigan, etc. et al.*, 362 U.S. 440 (1960) your Honorable Court again upheld state legislation concerning the inspection of boilers in interstate vessels in accordance with state standards, even though such boilers were approved by the federal agency involved. The Court upheld the state legislation and threw out the caveat that *courts* are not to seek out ". . . conflicts between state and federal regulation where none clearly exists" (362 U.S. 446).

The Supreme Court of Pennsylvania's decision not only eliminates flagging in Pennsylvania where there may be existing automatic block systems and manual block systems but also eliminates flagging where there are neither automatic nor manual controls in effect. Certainly

the order of the Supreme Court of Pennsylvania as to areas where there are no mechanical devices in effect goes far beyond any such conflicts with the Federal government. There clearly can be no supersession in areas where there are no Section 25 devices in effect. For the most part this constitutes the majority territory of the trains operating in any railroad system.

The Pennsylvania Public Utility Commission order in this case applies in all situations where a train on one track may be overtaken by another train on the same track. This could happen in an area where there are no automatic or manual devices in effect. This again, highlights the error of the reasoning of the Pennsylvania Supreme Court in saying that the mechanical device performs the exact same function as flagging. Both should exist for the safety of the public.

The decision in the instant case ignores the fact that Congress only entered the field of safety in very specific and limited situations and that the exercise of power generally resides with the States. A State should not be held to be powerless to cope with its safety problems.

It cannot be said that Congress has taken the entire subject matter of rear-end collisions in hand to the exclusion of state regulation; but only the installation of certain mechanical devices. This is pointed up by the fact that originally the Act of 1920 only applied to automatic devices and hence other devices were still within State control. See *International-Great Northern Railroad Company and Ewing Norwood and A. F. Fisher v. Railroad Commission of Texas*, 275 U.S. 503 (1927), affirming per curiam, 281 S.W. 1084 (Dec. 1926). In that case the State of Texas was held to have authority over

an interlocking device where lines of rail crossed each other in the City of Houston, Texas.

With the amendment of 1937, State jurisdiction over interlocking devices may now be superseded. Until the federal government actually seeks to move into a certain area of safety, state regulation must still remain.

This Court has recognized the necessity and importance of flagging under state control. For example, in *Smith v. State of Alabama,* 124 U.S. 465, 481, this Court listed among safeguards or precautions encompassed within the limits of local law:

> "The placing of watchmen and signals at points of special danger."

The Court said these things are

> ". . . strictly within the limits of the local law. . . ."

In *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U.S. 548, 560, this Court again recognized that the state may require railroads

> ". . . to have flagmen precede them to warn persons of their approach. . . ."

In *Nashville, Chattanooga & St. Louis Railway v. White, Administrator et al.,* 278 U.S. 456, Justice Holmes recognized that electric signals did not supplant flagmen and the State Court properly held the railroad negligent in failing to comply with an ordinance of the City of Memphis requiring all railroads on every street crossed by their trains to keep a flagman constantly on duty. He noted that the State could justifiably require a flagman in addition to electric devices for regulating traffic. Jus-

tice Holmes noted that even though electrical devices are more certain and should be adopted, a state is not to be condemned in imposing the requirement of a flagman to assist.

Many States and commissions which have dealt with flagging, have all uniformly recognized the question as a matter to be handled by the States and not by the Federal government. See the excellent decision of the highest Court of the State of New Jersey, *In re: Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Engineers, etc., The Pennsylvania Railroad Company and Pennsylvania Reading Seashore Lines v. Board of Public Utility Commissioners, Department of Public Utilities and Brotherhood of Railway Trainmen et al.*, 49 N.J. 174, 229 A. 2d 505 (1967).

The State of Maryland has also issued a decision in which it has considered flagging to be a matter for State jurisdiction. See *Brotherhood of Railroad Trainmen v. Baltimore and Ohio Railroad Company*, 238 A. 2d 516 (1968). Although the decision was 4 to 3, the Maryland Court affirmed the lower court which permitted the railroad to discontinue flagging except in certain limited situations. The Circuit Court, Baltimore City, indicated the requirements for the railroads to continue flagmen as set forth in the footnote.[1]

---

[1] "Understandably, one's initial reaction to a proposal to eliminate a safety factor of long standing is to view it with considerable doubt and scepticism. After a careful consideration of all the evidence, however, it is the opinion of this Court that the evidence produced by the Brotherhood, as the complainant before the Commission, did not meet the required burden of proof. A close scrutiny of the record indicates that the preponderance of evidence, on the contrary, shows that the automatic block signal system, and Pennsylvania's manual block signal system (when

In addition to these states, the State of Delaware has taken jurisdiction of flagging, in a similar case. For example, see *Public Service Commission of the State of Delaware.* (Docket 440). The Illinois Public Service Com-

---

Pennsylvania's Rule 316 is in effect) as well as the proposed B & O rule, are as infallible as can be humanly devised, and that any possible errors on the part of the engineers of the following trains, such as the failure to observe a signal, might well be encouraged by a mandatory requirement of flagging. Moreover, the record shows that Pennsylvania's number of rear-end collisions has actually decreased, rather than increased, since October 18, 1964, when its Rule 99 was last amended. The safest system, of course, would be the installation of two-way radio contact between the dispatcher and the engineers of all trains under his signal supervision. It is surprising, in this advanced electronic age, that the railroads have not inaugurated such a system, the cost of which would probably be only a fraction of the losses resulting from a serious but avoidable accident.

The holding in this case is subject to two exceptions which are apparent from the record before the Commission. These exceptions are as follows:

1. The Pennsylvania rules provide that the following train, after the engineer has received a signal of an obstruction ahead, must operate at 'restricted speed'—i.e., 'not exceeding 15 miles per hour prepared to stop short of . . . obstruction'. As the evidence before the Commission shows that the following train, even moving at 'restricted speed' cannot always be stopped at this speed short of an obstruction, due to the curvature or grade of the tracks or weather conditions, the rules should be amended to require the engineer of the following train to proceed at a 'reduced speed' and always be prepared to stop within the range of the engineer's forward vision.

2. The flagging requirements should be fully complied with to give protection to the following train, where the crew of the front train has knowledge of emergency conditions (such as a defective rail) affecting the safety of the following train, when such conditions are such that the engineer of the following train is not required to know or to anticipate on the basis of signals, train orders, rules, or otherwise.''.

mission has also taken jurisdiction. (Case No. 5097). West Virginia Public Service Commission has taken jurisdiction in a similar case (Case No. 6024). In all of these cases, not one Commission nor State Court has ruled in agreement with the Pennsylvania Supreme Court's ruling in this case, viz., that Section 25 of the ICC Act has superseded all state jurisdiction concerning flagging.

It may also be noted from this record that the Honorable Robert W. Ginnane in correspondence with the parties indicated that Section 25 of the ICC Act has never been construed by the ICC as including flag protection, and no regulations have ever been issued by the ICC or the Department of Transportation concerning this matter. The Honorable Robert W. Ginnane indicated that the ICC decision in Order No. 29543, dealt with the question of flag protection only as a "permissive requirement" to allow such movements. Mr. Ginnane indicated that the Commission has never construed flagging to be one of the safety appliances nor a "system" or "method" under Section 25.

H. R. Longhurst, for the Department of Transportation, also indicated in his letter ". . . that the manner in which flag protection is provided is an operating matter over which we do not exercise jurisdiction." With all of these individuals in the field taking the position they have, it is hard to understand how the Pennsylvania Supreme Court can take the position it has.

CONCLUSION

Certiorari should be granted in this case to correct an error of the decision of the Pennsylvania Supreme Court and also to prevent substantial danger from occurring to the public by the acceptance of the proposition that the States of this Nation are without jurisdiction to require flagging in areas both inside and outside of Section 25 devices. The decision in this case, if allowed to stand, would greatly endanger the safety of the public. The decision of the Pennsylvania Supreme Court would have the effect of rendering obsolete and invalid flag requirements which have been in effect in many states throughout the United States for many years.

Wherefore, it is respectfully requested that our Petition for Certiorari be granted and that the matter be set down for plenary consideration of the facts.

Respectfully submitted,

WILLIAM A. GOICHMAN
Assistant Counsel
EDWARD MUNCE
Assistant Counsel
JOSEPH C. BRUNO
Chief Counsel
For Pennsylvania Public Utility Commission

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 32 May Term, 1968

Bessemer and Lake Erie Railroad Company,
Appellants

vs.

Pennsylvania Public Utility Commission

Reported at 430 Pa. 339 (1968)

I.

OPINION

By Mr. Justice Roberts, May 21, 1968:

With the advent of mechanical devices for controlling the movement of more than one train on a single track, many railroads in Pennsylvania have abandoned the old system of flagging, whereby a man was dispatched to the rear of a halted train to place flares and wave flags, thus insuring against rear end collisions. The

abandoning of the flaggers forms the basis of this controversy.

On July 22, 1964, a union filed a complaint before the Pennsylvania Public Utility Commission against the Pittsburgh and Lake Erie R. R. Co., alleging that the railroad had amended its rule 99 to eliminate flagging in those areas controlled by automatic signal devices, that this amendment has resulted in an unsafe warning procedure, and that the interests of public safety required that the commission order the railroad to reinstate its flagging controls. In October of the same year, the same union filed a "petition" against all railroads operating in Pennsylvania, including the P. & L. E., alleging that other railroads have also eliminated flagging, and urging the Commission to promulgate a rule to require flagging in *all* areas where a train stops under circumstances in which it may be overtaken by another train. As a result of these two actions, the commission heard extensive testimony by experts from both the union and the railroads, and, as a result of this testimony, issued its Rule 16 on November 22, 1965, requiring flagging in all areas, subject to certain exceptions dealing with passenger train stops, interlocking plants, storage yards, and those semi-automatic signal systems in which oncoming trains are required to come to a complete stop. The railroads immediately took an appeal to the Superior Court.

Before argument could be heard, the union and the commission successfully petitioned the Superior Court to remand the case for further hearing on the ground that many of the Rule 16 exceptions were unclear. As a result of this remand, a new, amended version of Rule 16 was issued on December 19, 1966; this new rule con-

tains no specific exceptions to the flagging requirements. In an opinion by President Judge Ervin, the Superior Court affirmed the commission's order. 210 Pa. Superior Ct. 7, 232 A. 2d 220 (1967), and we granted allocatur, limiting argument, however, to the issue of whether §25 of the Interstate Commerce Act, 49 U.S.C. §26,[1] has pre-

---

[1] Section 25 of the Interstate Commerce Act provides in pertinent part as follows:

"*Order to install systems, etc.; modification; negligence of carrier*

"(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, *and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation* which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad such order to be issued and published a reasonable time (as determined by the Commission) in advance of the date for its fulfillment: *Provided,* That block signal systems, interlocking, automatic train stop, train control, and cab-signal devices in use on August 26, 1937, or such systems or devices hereinafter installed may not be discontinued or materially modified by carriers without the approval of the Commission: . . .

"*Filing report on rules, standards, and instructions with Commission; time; modification*

"(c) Each carrier by railroad shall file with the Commission its rules, standards, and instructions for the installation, inspection, maintenance, and repair of the systems, devices, and appliances covered by this section within six months after August 26, 1937, and, after approval by the Commission, such rules, standards, and instructions, with such modifications as the Commission may require, shall become obligatory upon the carrier: *Provided, however,* That if any such carrier shall fail to file its rules, standards, and instructions the Commission shall prepare rules, standards, and instructions for the installation, inspection, maintenance, and repair of such systems, devices, and appliances to be observed by such carrier, which rules, standards, and instructions, a copy thereof having been served on the president, chief operating of-

empted state regulation dealing with flag protection. Having thoroughly reviewed the applicable statutes and judicial precedents, we hold that federal legislation *has* preempted any state intervention in this particular area, a holding supported by three separate reasons.

First, there can be no doubt whatsoever that the mechanical devices specifically required by §25 perform the *exact same function* that manual flagging is intended to perform (i.e., increasing safety by preventing rear end collisions); second, the language used in §25 is broad enough to indicate that Congress has chosen to regulate the entire field of rear end collision prevention; and third, the Supreme Court of the United States has announced the rule that where federal language is broad enough to indicate preemption, a state law cannot escape interdiction on the ground that it does not *conflict* with the federal regulations actually passed.

The first reason for our decision today, that §25 devices perform the same function as flagging, needs little expansion. What is *most* significant about this identity of functions, however, is this. If one looks behind the actual mechanical devices themselves, §25 is really nothing

---

ficer, trustee, or receiver, of such carrier, shall be obligatory: *Provided further,* That *such carrier may from time to time change the rules, standards, and instructions herein provided for, but such change shall not take effect and the new rules, standards, and instructions be enforced until they shall have been filed with and approved by the Commission:* And provided further,* That the Commission may on its own motion, upon good cause shown, revise, amend, or modify the rules, standards, and instructions prescribed by it under this subsection, and as revised, amended, or modified they shall be obligatory upon the carrier after a copy thereof shall have been served as above provided." (Emphasis marked "*" supplied.)

more than a federal statute designed to keep one train from running into the rear of another. Congress having once determined how best to avoid this type of disaster, it is no longer open to the states to decide that the federal protections are inadequate, and that additional safety measures must be taken by interstate railroads whenever their trains run through Pennsylvania.

Furthermore, the language of §25 indicates that the Interstate Commerce Commission (now the Department of Transportation [D.O.T.])[2] has the power to require flag protection to supplement the safety features of mechanical collision prevention devices. In addition to requiring those types of automatic devices set out in the opening sentence of §25(b), the Commission may also require "other similar appliances, methods, and systems intended to promote safety of railroad operation. . . ." The argument advanced by appellees that the §25 language is limited only to mechanical devices, whereas flagging cannot be classified as a device at all, falls flat in the face of this language. For the statute, in addition to permitting the Commission to require "appliances" not specified in the statute itself, also permits the establishment of additional "methods and systems" to prevent rear end collisions. Flagging can certainly be classified as either a "method" or a "system."

Admittedly, neither the ICC nor the DOT has ever issued any blanket regulations pursuant to §25 covering flag protection. However, not only is the federal agency's failure to regulate flagging itself not dispositive when

---

[2] On April 1, 1967 all railroad safety regulations formerly administered by the I.C.C. were placed under the aegis of the Department of Transportation, Federal Railroad Administration.

the issue of preemption is raised, see cases cited and discussed infra, but furthermore, the ICC, in 1947, *did* issue an order requiring railroads under certain specified circumstances to supplement their automatic controls with flag protection. See Order No. 29543, issued pursuant to Appliances, Methods, and Systems Intended To Promote Safety of Railroad Operation, 268 I.C.C. 547, 560-61 (1947).[3]

It is certainly too late in the development of constitutional law to say that Congress may not preempt an entire field by the passage of a broad based statute, even though the regulations passed pursuant to that statute do not in fact cover every possible situation. Moreover, once such a statute is passed, and the intention to pre-

---

[3] Order No. 29543 requires all Class I and all switching and terminal railroads subject to the Interstate Commerce Act to install either automatic or manual block control systems on those parts of the lines where passenger trains operate at more than 60 mph, or where freight trains operate at more than 50 mph. The order further requires that if the manual block control system is used it shall be supplemented by flag protection whenever a passenger train is admitted to a block occupied by another train, or a passenger train occupies a block into which any other train seeks entry.

The Department of Transportation, by two letters dated July 6, 1967 and July 31, 1967, informed counsel for appellant railroads that this order is still in effect, and was adopted on April 1, 1967 by the Federal Railroad Administration. Prior to that date, the order had been followed in two cases. See *In the Matter of Application for Approval of Proposed Modifications of Systems or Devices under Paragraph (b), Section 25 of the Interstate Commerce Act, as amended* (Pennsylvania Railroad Company), 293 I.C.C. 765, 768 (1954); *In the Matter of Application for Approval of Proposed Modifications of Systems or Devices under Paragraph (b), Section 25 of the Interstate Commerce Act, as amended* (Pennsylvania-Reading Seashore Lines), 298 I.C.C. 503, 506 (1956).

empt state law in the area becomes manifest, the various states may not pass legislation even supplemental to the federal rules, so long as the area affected by these supplemental acts coincides with the federal bailiwick. For example, in Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 47 S. Ct. 207 (1926), two state statutes which required automatic fire doors and cab curtains on locomotives were declared unconstitutional on the ground that the federal Locomotive Boiler Inspection Act was the exclusive pronouncement on mandatory locomotive equipment. No one in Napier contended that the federal act actually *had* any provisions relating to such cab curtains and fire doors. The Supreme Court nevertheless held that the states were powerless to supplement the federal equipment requirements with additional safeguards of their own. The appellee in the present case attempts to distinguish Napier by relying on In Re Complaint of Brotherhood of R.R. Trainmen v. Public Utility Commissioners of New Jersey, 49 N.J. 174, 229 A. 2d 505 (1967). However, in our view, New Jersey's explanation of Napier is unsatisfactory.

According to the Brotherhood decision, Napier does not control because it dealt with equipment actually attached to the locomotive and passing from state to state, rather than with a requirement styled by the New Jersey Court as a "supplemental local emergency safety device." We believe this to be a distinction without legal substance. Just as in the present case, an attempt was made in Napier to show that the state law was aimed at a completely different evil than that covered by the Boiler Inspection Act. It was there contended that the federal locomotive requirements were intended to keep trains from having accidents, whereas the local fire door and cab curtain statutes were designed for engineer health and safety.

That argument failed to persuade the Supreme Court of the United States. So also is this Court unmoved by an argument based on the purely "supplemental" nature of flagging. In fact, it would seem that Napier is a much *weaker* case for a finding of federal preemption than this insofar as the state statute there *was* intended to remedy a different problem than the federal law, whereas in the present case, the appellee's best argument is that flagging "supplements" automatic devices.

Finally, on this issue of supplemental state legislation, we shall follow the case of Pennsylvania R. Co. v. Public Service Commission of Pennsylvania, 250 U.S. 566, 40 S. Ct. 36 (1919). Pennsylvania had enacted a statute requiring cabooses to be equipped with rear platforms of certain minimum dimensions, even though the applicable federal statute permitted cabooses with no such platforms. In answer to the argument that the Pennsylvania statute merely "supplemented" the federal law by making cabooses safer, Mr. Justice Holmes had only to say: "when the United States has exercised its exclusive powers over interstate commerce as far as to take possession of the field, the States no more can supplement its requirements than they can annul them." 250 U.S. at 569, 40 S. Ct. at 37.

Agreeing with this great Justice, and believing that his words are just as applicable to the present case, we reverse the orders of the Superior Court and Public Utility Commission.

Dissenting Opinion by Mr. Justice Musmanno:

The Majority Opinion hitches the wagon of its argument to the star of Oliver Wendell Holmes by quot-

ing the illustrious jurist who said: "When the United States has exercised its exclusive powers over interstate commerce as far as to take possession of the field, the States no more can supplement its requirements than they can annul them."

This is epigrammatic, it is brilliant,—but it is untrue.

It is untrue that, by providing an additional measure of safety to a dangerous situation, the original forces of safety are annulled. Thus, I cannot go along with the Majority's reasoning that because Justice Oliver Wendell Holmes said something some fifty years ago, life and limb on the railroads of Pennsylvania should be denied the protection proclaimed by the sovereign state of Pennsylvania.

I bow to no one in my admiration for Justice Oliver Wendell Holmes. There is no question that in the constellation of juristic eminence his star is a bright one indeed, but no jurisprudential astronomer has asserted that it was a star that shone all the time with impeccable infallibility. I personally know of an occasion when that luminary failed to scintillate with the sapient effulgence assigned to it by the Majority Opinion. I was one of the attorneys in the Sacco-Vanzetti case who called on Justice Holmes at his home in Beverly, Massachusetts to ask that he sign a stay of execution of the two doomed men. I had filed in the Supreme Court of the United States in Washington a petition for a writ of certiorari addressed to the Supreme Court of Massachusetts, averring that the two defendants had been denied due process of law under the Constitution of the United States. Holmes refused to

sign the stay, saying that the Federal government had no right to interfere in a purely state matter. His loyalty to Massachusetts and his instinctive wish that this grand old State should not be declared wrong before the eyes of the world, which had taken the Sacco-Vanzetti case to its heart, would not permit him to rise to the magnificent courage he had displayed in the case of Frank v. Magnum, 237 U.S. 309. In that *cause celebre* he had denounced the State of Georgia for allowing Leo Frank to be tried in an atmosphere of menace which dominated the deliberations of the jury. Holmes admitted that Sacco and Vanzetti had been tried in the same kind of hostile atmosphere: "It was their (Sacco's and Vanzetti's) misfortune to be tried in a community that was stirred up, if not frightened, by manifestations . . . and . . . I presume that the jury felt like the community."

Nevertheless, his chauvinistic pen remained in its holder when I, with my brother attorneys, presented the petition for the stay of execution to him, and thus two ill-treated working men were denied a review, to which they were entitled, in the Supreme Court of the United States. Three other justices must share the blame with Justice Holmes in this failure of justice.

Accordingly, in spite of my never-diminishing admiration for Justice Holme's brilliant and historical career, I cannot bring myself to regarding him omniscient. Even Homer nodded and it is clear Holmes nodded in the Sacco-Vanzetti case. It is also apparent that a little drowsiness crept into his pen when he wrote the utterance which the Majority quotes with the assurance that seems to say that, once Holmes has spoken on a subject, all fountains on that theme may as well dry up. In point of fact, the well of

state constitutional sovereignty did not empty with Holmes's pronouncement, or anybody else's pronouncement. The reservoir of state police power to protect the lives of the population within its borders has not drained simply because the Federal Government has legislated on the subject of railroads.

The Supreme Court of the United States acknowledged this fundamental truism in Federal-State relationship, when it said in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440: "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce,' . . . never intended to cut the States off from legislating on all subjects relating to *the health, life, and safety of their citizens,* though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may effect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." (Emphasis supplied.)

In Head v. New Mexico Board of Examiners, 374 U.S. 424 the issue for decision was whether the state of New Mexico could regulate advertising on radio in view of the Federal Communications Act. The Supreme Court said: "Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce . . . Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the

statute thus falls within the most traditional concept of what is compendiously known as the police power."

The case we are considering here has to do with safety on the railroads. About the most fundamental rule that can be considered on proper railroad operation is the one that says there cannot be, and there must not be, two railroad trains or locomotives on the same stretch of track at the same time. This superlatively hazardous situation was immortalized in the ballad of Casey Jones, whose most telling stanza dramatically relates:

> "Casey pulled up that Reno Hill,
> He tooted for the crossing with an awful shrill,
> The switchman knew by the engine's moan,
> That the man at the throttle was Casey Jones.
> He pulled up within two miles of the place
> Number Four stared him right in the face.
> He turned to the fireman, said 'Boy, you'd better jump,
> 'Cause there's two locomotives that's a-goin' to bump.'"

And the locomotives did bump. And Casey Jones went on to everlasting renown with the ever-recurring refrain:

> "Casey Jones, two locomotives,
> Casey Jones, that's a-goin' to bump,
> Casey Jones, two locomotives,
> 'There's two locomotives that's a-goin' to bump.'"

It is to prevent the bumping of locomotives or trains on the same track that a system of flagging has developed on the railroads of the nation. In the early part of 1964 certain railroads in Pennsylvania initiated a program to

eliminate flagging. On July 22, 1964, the Railroad Brotherhoods, acting through some of its members, filed a complaint with the Pennsylvania Public Utility Commission, protesting the elimination of flagging protection and asking that the commission order the reinstitution of "adequate and proper flag protection." Specifically the complaint asked that the commission require flagging protection "when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab, automatic block or manual block signal system rules."

Fourteen railroad systems in Pennsylvania filed answers denying that there was any necessity for the flagging system, insisting that the automatic devices now in operation met the requirements of safety. The commission sat for many days taking testimony, which, in the printed record, covers some 2,000 pages. The commission found and so declared that the elimination of flag protection jeopardized the safety of the public and railroad employees. It accordingly ordered that "When a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail and when necessary, in addition, display lighted fusees."

The railroad companies appealed to the Superior Court which affirmed the order of the commission, stating in its opinion that: "We do not exercise our independent judgment but only look to see whether the commission's findings are supported by substantial competent evidence."

The Superior Court found that the commission's findings were justified by the evidence. The railroads petitioned this Court for allocatur which was granted.

The railroads here ask that the order of the Pennsylvania Commission be vacated on the basis that Congress has, under the Interstate Commerce Act, preempted the field of train protection so as to preclude state regulation on flagging protection. Of course, we are bound, as the Superior Court was, to accept the facts as found by the commission.

In view of the factual situation declared by the commission I do not see how the Majority can conclude that the law requires a reversal of the Superior Court and the commission. Such a reversal means a Casey Jones collision with the decision of the Supreme Court of the United States in Brotherhood of Locomotive Eng. v. Chicago, R.I. & P.R. Co., 382 U.S., where the high court declared: "Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional legislation on that subject, however, the *States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public.*" (Emphasis supplied).

In Southern Pacific Co. v. Arizona, 325 U.S. 761, the Supreme Court also said: "There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

How can flagging by reducing possibility of accidents restrict the free flow of commerce across state lines or interfere with it in any way?

The Majority Opinion states that "there can be no doubt whatsoever" that the mechanical devices specifically required by §25 (of the Interstate Commerce Act) perform the exact same function that manual flagging is intended to perform." The answer to this statement is that there is no doubt whatsoever that the Interstate Commerce Act does *not* perform the functions manual flagging performs. The evidence presented before the Pennsylvania Commission proved conclusively that, with the mechanical devices, accidents occurred which would not have happened had there been flag protection.

The Majority makes no reference to the evidence in this case which, as I have already stated, covers some 2,000 pages. The Majority seems to gloss over the whole purpose of these proceedings. The Railroad Brotherhoods specifically pointed out how in the mountainous and habitually foggy areas which make up a large portion of the railroad areas in Pennsylvania, instantaneous flag protection is required if trains are to be brought to a stop, and this is particularly true because of trains of the Pittsburgh & Lake Erie and the Baltimore & Ohio Railroad "using the same tracks, which, in many cases have the view obscured by hills and curves."

The Brotherhoods produced evidence to substantiate their complaint that: "Any reliance by the railroad upon Automatic Block Signal Systems or other automatic devices is ill-conceived and ill-advised, as experience has shown that such devices cannot always be relied upon to

prevent accidents of the type which the flagging rule is intended, and over the years has, actually prevented,"

Automatic signalling by the use of track circuits first developed in 1872. The underlying principle of track circuiting is its capacity to detect and register the presence of a train, engine, or car on a track. The circuits are also designed to detect a broken rail, an open switch, or an unclosed drawbridge. Automatic track signalling systems are designed on a "fail-safe" principle, whereby a break in or shunting of a track circuit will actuate a restrictive signal aspect.

This is all well and good but the evidence at the hearings in this proceeding revealed that at times deposits of foreign matter, such as sand, rust and grease on rails or on an engine or car wheels interfere with the intended circuit shunting. Undesired electrical connections between control circuits of associated signals may cause "false-proceed" signal aspects to be displayed and, in addition, certain lightweight track maintenance and inspection equipment will not ordinarily shunt track circuits.

The Superior Court, in reviewing the evidence submitted to the commission, stated that: "Automatic signal malfunctions may result in a 'false-proceed' signal, or a 'false-restrictive' failure, the latter involving a more restrictive signal aspect than is warranted by track conditions. I.C.C. records showed 58 false proceed failures in the United States on all railroads in 1964, while the Penna. R. R. reported 2,422 false restrictive failures on its system in one year. The Commission found that the elimination of flag protection jeopardizes the safety of the public and railroad employees and that flag protection *augmenting*

that furnished by signals, was essential, whether the signals were manual or automatic."

Many witnesses testified to difficulties encountered with the automatic signal system. One telegraph operator, with 14 years experience stated that on three occasions, enginemen had difficulty reading a signal which displayed a red or stop block indication, "having interpreted the signal as displaying a yellow or restricting indication and on one occasion the train was operated beyond the signal, causing the engine to run through a switch." It was discovered later that the sun's rays had been responsible for the "misreadings" and a longer hood had to be attached to the signal to shield the color light from the sun.

Another witness related an experience where "two controlled interlocking signals governing separate tracks at McKeesport displayed signal indication which were not properly reflected on the tower operator's panel board due to a malfunctioning of the signal system."

The phenomenal, almost miraculous development in the mechanical world, is leading many to believe that wheels, nuts, screws and bolts are more reliable than the senses of human beings. But from time to time airplane crashes, railroad wrecks and ship sinkings shock contemporary society into an awareness that insensate mechanics have not yet displaced homo sapiens. An official report of the Department of Transportation (which has now supplanted the Interstate Commerce Commission) recently gave graphic illustration how the failure to use manual flag protection caused the death of one railroader and serious injury to another. The report states: "On November 18, 1966, a rear-end collision occurred between two Terminal Railroad Association of St. Louis freight trains at St. Louis,

Mo. *One employee was killed and one was injured.* The accident was caused by improperly permitting a train to enter an occupied manual block under a Clear manual block-signal indication, *failure of the carrier to arrange for adequate flag protection to the rear of the preceding* train, and failure of the engineer and conductor to operate the following train under control as required." (Emphasis supplied.)

The six printed volumes of testimony and exhibits in this case tell of many deficiencies in the mechanical signal system, all of which the Majority ignores, preferring to deal with theory rather than realities. I regret to say that it is my belief the Majority Opinion does not come to grips with the real problem in the litigation before us which has to do with the most momentous proposition on earth, namely, the preservation of human life. The Majority Opinion scarcely ever acknowledges that vital feature in the controversy between the railroad companies and the railroad Brotherhoods.

One can never, or should never, fail to realize that railroading is an extra-hazardous occupation. Fortunately and gratefully we recognize that railroad tracks are not the gory battlefields they once were, my father and two of my brothers having been railroaders. Still we cannot overlook that, with all the safety devices current, potential slaughter, maiming and crippling still stalk the ties and rails. We still look with sorrow on pictures in newspapers and on television screens of trains which have telescoped, of locomotives overturned, of blanketed forms lying on the ground, and ambulances clanging away carrying the injured and the disabled from railroad wrecks. Thus, every possible protection which can stave off these heart-

rending events should be welcomed by the railroads, not opposed.

The Majority Opinion says that "there can be no doubt whatsoever that the language of §25 indicates that Congress has chosen to regulate the entire field of rear end collision preventing." The answer is that there is nothing in §25, or any other part of the Interstate Commerce Act, which imposes any obligation to provide flag protection. Congress, by limiting its control over collisions to block signal, interlocking, automatic train stop, train control and cab-signal systems, has left the requirement of manual flag protection, where it has been since the first railroad was built, exclusively to the States.

The Majority Opinion states that, once Congress has decided how best to avoid one train from running into another, "it is no longer open to the States to decide that the Federal protections are inadequate." But it is not a matter of States determining inadequacy on the part of the Federal government. It is a matter of a State discharging its constitutional duties to offer the utmost safety to its people. The United States does not have authority over a single square inch of territory in the States which it does not get from the Federal Constitution or laws passed thereunder. The Supreme Court of the United States said in Rice v. Santa Fe Elevator Corporation, 331 U.S. 218: "We start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Thus, when Federal legislation says nothing about flag protection and there is no evidence that flag protection can do other than help to prevent train collisions, it

is folly to argue that the State must allow carnage on the railroad tracks when it has the means to avert it.

Since Congressional legislation does not prohibit flag protection, the railroads would, in order to maintain their position, have to prove that flag protection interferes with the mechanical devices or in some way renders them ineffective or less protective. There is nothing in the voluminous record to support any such bizarre conclusion. Why, then, deny to Pennsylvania the right to help in saving the lives of its citizens?

Then, the Majority says that since, under §25, the Interstate Commerce Commission may also require "other similar appliances, methods and systems intended to promote the safety of railroad operation," this means that it could, if it wanted to, require flagging. What it could or could not do is not the issue in this case. The fact is that Federal legislation or regulation does *not* provide for flag protection. To argue that Congress could provide for flag protection is like saying that it could also provide for additional fire engines after a conflagration has levelled a city in which a federal installation is located.

We are here dealing with realities, not theories; with danger on the railroad tracks, not abstractions in a philosopher's study.

The Majority founds its whole case on preemption. Preemption means monopoly and monopoly is a serious proposition. To say that the Federal Government with its limited, derived powers may monopolize a subject against the unlimited powers of the sovereign states is to make a monumental assertion. Of course, there is preemption, and there must be preemption, in certain fields under our dual

form of government. However, where preemption is asserted it cannot be implied, it must not be left to interpretation, much less surmise. The Majority Opinion does not deny that preemption on flagging protection by the Federal Government is not spelled out in the Interstate Commerce Act. In fact, it is not even mentioned.

In Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, the Supreme Court stated: "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, *it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.*" (Emphasis supplied) There is nothing in the language of §25 which is inconsistent with the employment of flagging by the State in order to further carry out the objectives of both Pennsylvania and the United States to save life. Why then does the Majority insist on thwarting Pennsylvania legislation?

The United States District Court for the Eastern District of Louisiana said in the recent case of Pearce v. Freeman, 238 F. Supp. 947, that "If it (Congress) chooses to circumscribe its regulations and occupy only a limited area in a given field, it leaves to the states the right to regulate outside of that limited area."

In Locomotive Engineers v. Chicago, R.I., U.S. , 34 Law Week, 4109, the Supreme Court said: "In the absence of congressional legislation on that subject, however, the *States have extensive power of their own to regulate in this field, particularly to protect the safety of* railroad employees and the public. (Emphasis supplied)

In the face of all these authorities, I cannot grasp the significance of the Majority decision. It insists on running

on the same track occupied by all the authoritative precedents I have here cited, and there are very many more. I see here a Casey Jones collision between law and arbitrariness. I see here a forcible exercise of judicial power which I fear may be the cause of accidents. Apart from the fact that I could be a passenger on one of the trains derailed and wrecked because of the absence of flagging protection, I feel content in the fact that I am not part of the wrecking crew working on dismantling the track of harmonious cooperation between the United States and the States.

Dissenting Opinon by Mr. Justice Cohen:

I disagree with the majority's conclusion that §25 of the Interstate Commerce Act, 49 U.S.C. §26 (1958), has pre-empted all state regulation in the area of flagmen protection in order to promote the local safety of railroad operation.

In support of federal pre-emption, the railroads and the majority opinion rely most heavily on Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 71 L. Ed. 432 (1926), where the United States Supreme Court struck down state requirements for cab curtains and automatic doors to fire boxes on the ground that Congressional enactment manifested an intention to occupy the entire field of locomotive equipment. The inapplicability of Napier to the instant situation has recently been decided by the Supreme Court of New Jersey in In Re Complaint of Brotherhood of R.R. Trainmen, Pennsylvania Railroad v. Public Utility Commissioners of New Jersey, 49 N.J. 174, 229 A. 2d 505 (1967). In deciding the identical issue presently before our Court, Justice Jacobs, writing for a unanimous New Jersey Court commented: "Napier has never been applied as broadly as the Railroads contend

(cf. Terminal R. Asso. of St. Louis v. Brotherhood of R. Trainmen, 318 U.S. 1, 4, 63 S. Ct. 420, 87 L. Ed. 571, 576 (1943); Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 766, 65 S. Ct. 1515, 89 L. Ed. 1915, 1922 (1945)); in any event it dealt, not with supplemental local emergency safety device, such as flagging, but with equipment attached to the locomotive which passes through from state to state and with respect to which the national interest in uniformity is vital and paramount. Similarly, the very Congressional language (49 U.S.C.A. §26(b)) points to the block signal systems themselves and to similar appliances where national uniformity is the concern rather than to local safety requirements which do not impair the design or sweep of the federal regulations.

"In Florida Line & Avocado Growers v. Paul, supra, the Supreme Court pointed out that federal regulation of a field in commerce should not be deemed preemptive of state power in the absence of persuasive reason—'either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' [Citations omitted.] And in Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co., supra, the Supreme Court, in upholding a state full crew law as against a claim of preemption, noted that in the absence of Congressional legislation as to what number of crew members, 'the States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public.' 382 U.S., at p. 429, 85 S. Ct., at p. 597, 15 L. Ed. 2d, at p. 505. Indeed it may be said that state regulatory provisions having local safety as their objective are the least likely to be held preempted. [Citations omitted.]; see also Pennsyl-

vania Railroad Co. v. Dept. of Public Utilities, supra, where we stated that we were not convinced that there is merit to the Pennsylvania's contention 'that Congress has occupied the field of automatic block signals to the total exclusion of any state safety requirements bearing hereon.' " 14 N.J., at p. 434, 102 A. 2d, at p. 630.

While I recognize the supremacy of federal legislation in areas partially occupied by Congressional enactment, it is not always clear and at times most perplexing to determine whether it was the Congressional intent to occupy the entire area. In Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 91 L. ed. 1447, the Supreme Court of the United States enunciated the conflicting values and guidelines which must be assessed before determining questions of federal preemption. Justice Douglas, speaking for the majority of the Court remarked: "So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611, 71 L. ed. 432, 438, 47 S. Ct. 207; Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Bd., 315 U.S. 740, 749, 86 L. ed. 1154, 1164, 62 S. Ct. 820. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so persuasive as to make reasonable the inference that Congress left no room for the States to supplement it. [Citations omitted.] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Hines v. Davidowitz, 312 U.S. 52, 85 L. ed. 581, 61 S. Ct. 399. Likewise, the object sought to be obtained by the

federal law and the character of obligations imposed by it may reveal the same purpose. [Citations omitted.] Or the state policy may produce a result inconsistent with the objective of the federal statute. Hill v. Florida, 325 U.S. 538, 89 L. ed. 1782, 65 S. Ct. 1373. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the State and federal regulations collide." [Citations omitted.]

After carefully analyzing and evaluating the relevant considerations outlined in Rice, I am drawn to the conclusion that §25 of the Interstate Commerce Act does not preclude state regulation in the nature of flagmen protection.

Moreover, the majority opinion, in my view, misconstrues the language of §25 by concluding that the language used therein is broad enough to indicate that Congress has chosen to regulate the entire field of rear end collision prevention. Section 25 provides in pertinent part as follows: "(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation, which comply with specifications and requirements prescribed by the Commission *upon the whole or any part of its railroad . . . Provided further,* That a carrier shall not be held to be negligent because of its failure to install such systems, devices, appliances, or methods *upon a portion of its railroad* not included in the order, and any action arising because of an

accident occurring *upon such portion of its railroad* shall be determined without consideration of the use of such systems, devices, appliances, or methods *upon another portion of its railroad.*" (Emphasis supplied.)

The use of the language "upon the whole or any part of its railroad" indicates that Congress only intended to empower the Interstate Commerce Commission to regulate the installation of safety appliances, methods, and systems which have some physical connection with the actual railroad cars or its appurtenances. Section 25 in no way confers authority on the Commission to promulgate rules and regulations with respect to safety devices which are not affixed "upon the whole or any part of its (referring to the carrier) railroad." The result achieved by the majority today for all practical purposes renders the meaning and purpose of that language nugatory inasmuch as its interpretation of §25 ignores what I think was the obvious intent of Congress, i.e., to preclude state regulation with respect to equipment attached to the railroad where the need for national uniformity is most vital to the national interest.[1]

---

[1] This construction of §25 is further substantiated by a reading of paragraph (e) under the Act which provides as follows: "It shall be unlawful for any carrier to use or permit to be used on its line any system, device or appliance covered by this section unless such apparatus, with its controlling and operating appurtenances, is in proper condition and safe to operate in the service to which it is put, so that the same may be used without unnecessary peril to life and limb, and unless such apparatus, with its controlling and operating appurtenances, has been inspected from time to time in accordance with the provisions of this section and is able to meet the requirements of such test or tests as may be prescribed in the rules and regulations provided for in this section."

What else could Congress have intended by its inclusion of the language "upon the whole or any part of its railroad" since it could have arrived at the same result reached by the majority of this Court by the simple method of excluding that language from the Act? For these reasons I would affirm the judgment of the Superior Court.

I dissent.

Mr. Justice Eagen joins in this dissenting opinion.

Based upon the foregoing, it is extremely difficult to understand how the majority of our Court could arrive at its conclusion. It seems so obvious that Congress only intended to permit the Interstate Commerce Commission to regulate certain equipment and/or mechanical devices and their appurtenances and never intended to include under this Act regulatory power with respect to flagmen protection. Every word used in paragraph (e) refers to some sort of mechanical device and not one word therein relates to or encompasses the manual waiving of flags to prevent rear end collisions.

SUPREME COURT OF PENNSYLVANIA
Middle District

II.
ORDER

July 15, 1968. Petition denied.

Per Curiam.

III.

PORTIONS OF INTERSTATE COMMERCE ACT

(No. 49 U.S.C. §26)

* * * * * * * * *

§26. SAFETY APPLIANCES, METHODS, AND SYSTEMS—(A) DEFINITION OF CARRIER

The term "carrier" as used in this section includes any carrier by railroad subject to this chapter (including any terminal or station company), and any receiver or any other individual or body, judicial or otherwise, when in possession of the business of a carrier subject to this section: *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of a general steam-railroad system of transportation now or hereafter operated by any other motive power.

ORDER TO INSTALL SYSTEMS, ETC.; MODIFICATION; NEGLIGENCE OF CARRIER

(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad such order to be

issued and published a reasonable time (as determined by the Commission) in advance of the date for its fulfillment: *Provided,* That block signal systems, interlocking, automatic train stop, train control, and cab-signal devices in use on August 26, 1937, or such systems or devices hereinafter installed may not be discontinued or materially modified by carriers without the approval of the Commission: *Provided further,* That a carrier shall not be held to be negligent because of its failure to install such systems, devices, appliances, or methods upon a portion of its railroad not included in the order, and any action arising because of an accident occurring upon such portion of its railroad shall be determined without consideration of the use of such systems, devices, appliances, or methods upon another portion of its railroad.

FILING REPORT ON RULES, STANDARDS, AND INSTRUCTIONS WITH COMMISSION; TIME; MODIFICATION

(c) Each carrier by railroad shall file with the Commission its rules, standards, and instructions for the installation, inspection, maintenance, and repair of the systems, devices, and appliances covered by this section within six months after August 26, 1937, and, after approval by the Commission, such rules, standards, and instructions, with such modifications as the Commission may require, shall become obligatory upon the carrier: *Provided, however,* That if any such carrier shall fail to file its rules, standards, and instructions the Commission shall prepare rules, standards, and instructions for the installation, inspection, maintenance, and repair of such systems, devices, and appliances to be observed by such carrier, which rules,

standards, and instructions, a copy thereof having been served on the president, chief operating officer, trustee, or receiver, of such carrier, shall be obligatory: *Provided further,* That such carrier may from time to time change the rules, standards, and instructions herein provided for, but such change shall not take effect and the new rules, standards, and instructions be enforced until they shall have been filed with and approved by the Commission: *And provided further,* That the Commission may on its own motion, upon good cause shown, revise, amend, or modify the rules, standards, and instructions prescribed by it under this subsection, and as revised, amended, or modified they shall be obligatory upon the carrier after a copy thereof shall have been served as above provided.

INSPECTION BY COMMISSION PERSONNEL

(d) The Commission is authorized to inspect and test any systems, devices, and appliances referred to in this section used by any such carrier and to determine whether such systems, devices, and appliances are in proper condition to operate and provide adequate safety. For these purposes the Commission is authorized to employ persons familiar with the subject. Such persons shall be in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. No person interested, either directly or indirectly, in any patented article required to be used on or in connection with any of such systems, devices, and appliances or who has any financial interest in any carrier or in any concern dealing in railway supplies shall be used for such purposes.

UNLAWFUL USE OF SYSTEM, ETC.

(e) It shall be unlawful for any carrier to use or permit to be used on its line any system, device, or appliance covered by this section unless such apparatus, with its controlling and operating appurtenances, is in proper condition and safe to operate in the service to which it is put, so that the same may be used without unnecessary peril to life and limb, and unless such apparatus, with its controlling and operating appurtenances, has been inspected from time to time in accordance with the provisions of this section and is able to meet the requirements of such test or tests as may be prescribed in the rules and regulations provided for in this section.

REPORT OF FAILURE OF SYSTEM, ETC., AND ACCIDENTS

(f) Each carrier shall report to the Commission in such manner and to such extent as may be required by the Commission, failures of such systems, devices, or appliances to indicate or function as intended; and in case of accident resulting from failure of any such system, device, or appliance to indicate or function as intended, and resulting in injury to person or property which is reportable under the rules of the Commission, a statement forthwith must be made in writing of the fact of such accident by the carrier owning or maintaining such system, device, or appliance to the Commission; whereupon the facts concerning such accident shall be subject to investigation as provided in sections 40-42 of Title 45.

DUTIES AND POWERS OF COMMISSION

(g) It shall be the duty of the Commission to see that the requirements of this section and the orders, rules, regulations, standards, and instructions made, prescribed, or approved hereunder are observed by carriers, and all powers granted prior to August 26, 1937, to the Commission are extended to it in the execution of this section.

PENALTIES; ENFORCEMENT

(h) Any carrier which violates any provision of this section, or which fails to comply with any of the orders, rules, regulations, standards, or instructions made, prescribed, or approved hereunder shall be liable to a penalty of $100 for each such violation and $100 for each and every day such violation, refusal, or neglect continues, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violations shall have been committed. It shall be the duty of such attorneys to bring such suits upon duly verified information being lodged with them showing such violations having occurred; and it shall be the duty of the Commission to lodge with the proper United States attorneys information of any violations of this section coming to its knowledge. Feb. 4, 1887, c. 104, Pt. I, §25, added as §26 by Feb. 28, 1920, c. 91, §441, 41 Stat. 498, amended Aug. 9, 1935, c. 498, §1, 49 Stat. 543; Aug. 26, 1937, c. 818, 50 Stat. 835; renumbered §25 by Sept. 18, 1940, c. 722, Title I, §14(b), 54 Stat. 919.

• • • • • • • •

IV.

PORTIONS OF PUBLIC UTILITY CODE

ARTICLE IV

SERVICE AND FACILITIES

Section 401 (66 P.S. §1171). **Character of Service and Facilities.**—Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employes and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility.

* * * * * * * * *

Section 413 (66 P.S. §1183). **Proper Service and Facilities Established on Complaint.**—Whenever the com-

mission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public, and shall fix the same by its order or regulation.

* * * * * * * *

ARTICLE IX

GENERAL PROVISIONS AND POWERS OF COMMISSION

Section 901 (66 P.S. §1341). **Administrative Authority of Commission; Regulations.**—The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act.

Section 902 (66 P.S. §1342). **Commission to Enforce Act.**—In addition to any powers hereinbefore expressly enumerated in this act, the commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular the provisions of this act, and the

full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this act shall not exclude any power which the * * *

* * * * * * * *

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U
FILED
AUG 26 1968
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1968

No. 443

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
THE PENNSYLVANIA RAILROAD COMPANY,
LEHIGH VALLEY RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
THE DELAWARE AND HUDSON RAILROAD CORPORATION, READING COMPANY,
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
WESTERN MARYLAND RAILWAY COMPANY,
ERIE LACKAWANNA RAILROAD COMPANY,
MONTOUR RAILROAD COMPANY,
THE MONONGAHELA RAILROAD COMPANY,
PITTSBURGH, CHARTIERS & YOUGHIOGHENY RAILWAY COMPANY,
Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

WILLIAM A. GOICHMAN
Assistant Counsel
EDWARD MUNCE
Assistant Counsel
JOSEPH C. BRUNO
Chief Counsel
For Pennsylvania Public Utility Commission

127 North Office Building
Harrisburg, Pennsylvania 17120

Mercantile Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

INDEX

PAGE

Supplemental Appendix to Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania:

V. Opinion of the Superior Court of Pennsylvania 81

VI. Decisions of the Pennsylvania Public Utility Commission:

Decision at Complaint Docket No. 18018 94

Decision at Petition 7 119

Decision at Petition 7 and Complaint Docket No. 18018 135

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

V.

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

(210 Pa. Superior Ct. 7, 232 A. 2d 220)

Opinion by Ervin, P. J., June 16, 1967:

These appeals by eleven railroads operating in Pennsylvania are from two orders of the Pennsylvania Public Utility Commission dated November 22, 1965 and December 19, 1966 ordering the railroads to promulgate appropriate operating rules to provide flagging protection "when a train stops [or is moving] under circumstances in which it may be overtaken by another train." In general, appellants contend that flagging protection is no longer necessary under automatic block and similar signal systems.

On July 22, 1964 the Co-Operative Legislative Committee, Railroad Brotherhoods, acting through three of its members, filed a complaint at C.18018 against the Pittsburgh & Lake Erie R.R. Co., alleging the railroad had, in April of 1964, by a note to its Rule 99, eliminated flagging protection against following trains on the same track when operating under automatic block signal or traffic control system rules; that such procedure was unsafe, and asking the commission to order P. & L. E. to

"reinstitute adequate and proper flag protection" in its system in Pennsylvania.

On October 26, 1964 the Brotherhoods Committee filed a petition (Docketed at P.7), served on all railroads operating in the state (including the P. & L. E. R.R., Appeal No. 141, March T., 1966), alleging that *some* railroads, by amendment to so-called Rule 99, eliminated flag protection in cases of trains operating under "locomotive cab signal system, automatic block signal system, or manual block signal system rules"; that proper safety measures required flagging under such circumstances. Accordingly the petition asked that the commission promulgate a regulation requiring flagging protection "when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab, automatic block or manual block signal system rules." The railroad appellants filed separate answers, admitting in some instances that flagging had been eliminated as to trains operating under automatic signal system or traffic control system rules, and denying there was any necessity, in regard to safety, for the promulgation of rules as to flagging in automatic signal systems. The carriers, in fact, contended the use of flagging procedures in automatic block territory would be a step backward to outdated methods and a positive impediment to safety.

Thereafter the commission held separate hearings on Dockets C.18018 and P.7. Witnesses for the Brotherhoods gave testimony tending to show the necessity of maintaining flagging rules. The carriers presented testimony to show that resort to flagging in automatic block signal and kindred signal systems, hindered, rather than enhanced, safety. The commission issued separate orders at C.18018

(in No. 142) and in P.7 (Nos. 133-144), both orders being dated November 22, 1965. The commission order at P.7, of November 22, 1965, states: "For many years it was the custom and practice of all railroads operating within Pennsylvania to require, generally by application of Rule 99, that stopped trains be protected against following movements by flagmen . . . and the carriers have considered this rear-end flag protection essential to safe operation." The commission explained that the automatic system involves a "fail-safe" principle, whereby a break in the electrical circuit will actuate a restrictive signal aspect. Automatic signal malfunctions may result in a "false-proceed" signal, or a "false-restrictive" failure, the latter involving a more restrictive signal aspect than is warranted by track conditions. I. C. C. records showed 58 false proceed failures in the United States on all railroads in 1964, while the Penna. R. R. reported 2,422 false restrictive failures on its system in one year. The commission found that the elimination of flag protection jeopardizes the safety of the public and railroad employes and that flag protection *augmenting* that furnished by signals, was essential, whether the signals were manual or automatic.

Accordingly the commission issued an order at Docket P.7 providing that all railroads operating in the state promulgate rules to require flag protection "for trains moving [or stopped] on main or secondary tracks, under circumstances in which such trains, may be overtaken by following trains . . . in manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories, *except* within the limits of interlocking plants, at stations where passenger trains are making normal station stops, within the limits of a classification

on storage yard and manual block territory protected by an absolute block." (Emphasis supplied) A note to the order stated that when trains are operating under automatic block signal system (and like systems) flagging requirements "will have been complied with when full protection is afforded against trains moving at restricted speed." The order at C.18018 directed P. & L. E. R.R. to operate its trains consistently with the above quoted order, designated as Rule 16 of the commission. The railroads appealed to the Superior Court from the orders of the commission dated November 22, 1965 at Dockets C.18018 and P.7, and all appeals were consolidated for argument. On March 15, 1966 this Court granted the petition of the commission for remission of the record. The commission then sent a letter to counsel of record in Dockets P.7 and C.18018, quoting the petition for remand and stating in general that the parties had difficulty in interpreting the commission's order of November 22, 1965; that there was confusion, as applied to certain railroads, in the application of such terms as "(1) interlocking plants and the limits thereof; (2) classification yards and the limits thereof; (3) storage yards and the limits thereof; . . . (6) main track; (7) secondary track; . . . (12) train; (13) normal station stops; (14) absolute block; . . ." etc. Pursuant to this letter further joint hearings were held on Dockets P.7 and C.18018 and incorporated in a supplemental record. Testimony and exhibits were presented as to the meaning of various terms relating to flagging protection. The commission then entered its order of December 19, 1966 stating that advice received showed "adherence to Rule 16 [November 22, 1965 order] lacks uniformity and on some railroads is practically nonexistent" and that there was confusion as to the meaning of the terms "standard flagging equipment," "trains moving on

main or secondary tracks," and "within the limits of a classification or storage yard." The commission then stated that "the basic requirements of our order [of November 22, 1965] are in the general interest of the public and should not be materially disturbed. However, in order to eliminate the apparent confusion and misinterpretation of certain diction used in our existing order, flagging should be performed on main tracks, secondary tracks, or on any tracks used for the movement of trains, where a train stopped or moving, may be overtaken by another train, whether within a yard proper; adjacent to the entrance to a yard; or in areas designated by a railroad as yard limit territory." The commission then quoted the November 22, 1965 order in P.7 and also at C.18018, and "modified" it to direct all railroads to promulgate rules "in conformity with the following: (a) When a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and/or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail and when necessary, in addition, display lighted fusees.

"(b) When recalled and safety to the train will permit, he may return.

"(c) When conditions require, he will leave the torpedoes and a lighted fusee.

"(d) The front of the train must be protected in the same way, when necessary, by a member of the crew.

"(e) When a train is moving under circumstances in which it may be overtaken by another train, a member of

the crew must take such action as may be necessary to insure full protection. By night (or by day, when the view is obscured) lighted fusees must be dropped off the moving train or displayed at proper intervals.

"(f) When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used.

"(g) Conductors and enginemen are responsible for the protection of their trains.

"(h) When a pusher engine is assisting a train, coupled behind the cabin or caboose car, and the member of the crew who protects the rear-end of the train is riding in the cabin or caboose car, the requirements as to the use of fusees will be met by dropping them off between the cabin or caboose car and pusher engine on the track the train is using, and not between that track and an adjacent track."

The flagging rule spelled out in the commission's modified order of December 19, 1966 was in essence Rule 99 of many railroads, more particularly the Pennsylvania Railroad, as it existed prior to 1945. However, the modified order of December 19, 1966 did not contain any *express* exceptions to flagging protection in automatic and other signal territory, but the December order did state: "4. That in all respects *not inconsistent herewith,* our orders issued November 22, 1965, at P.7 and at C.18018, remain in full force and effect. . . ."

On January 17, 1967 the appellant railroads filed a petition for supersedeas and stay of the commission order of December 19, 1966, to which the commission filed an answer. On January 28, 1967 the commission filed a mo-

tion to quash the carriers' appeals, on the ground that its orders as to flagging protection were made in the exercise of its rule-making power, presented no "justiciable controversy" and were not appealable, under the decision in Pa. R.R. Co. v. Pa. P.U.C., 396 Pa. 34, 152 A. 2d 422 (1959). We ordered the petition for supersedeas and motion to quash heard on the argument on the merits, all proceedings to stay meanwhile.

The present order of the commission was issued following (1) a complaint proceeding (C.18018) by the Brotherhoods against P. & L. E. R.R., and (2) a petition (P.7) by the Brotherhoods served upon all railroads operating in the state, to which the carriers filed answers. At one point the commission referred to this as a "consolidated complaint proceeding." It also takes the position, as regards the motion to quash, that this is entirely a rule making procedure, involving no actual controversy. Here a complaint and petition were filed, the carriers filed answers, extensive testimony was presented, and the commission had before it the facts showing the extent of flagging protection directed under the rules of the appellant carriers. In substance the proceedings were complaints against the carriers as to their nonobservance of allegedly necessary flagging regulations. The carriers were *ordered* and *directed* by the commission to put into effect a ruling of the commission as to flagging protection as a safety measure. Appellants should not be required to refuse to obey the commission's orders and await enforcement proceedings in order to test the legality of such orders. See §1001 of the Public Utility Law, 66 PS §1391. We feel that the present orders are appealable and Penna. R.R. Co. v. Pa. P.U.C., 396 Pa. 34, 152 A. 2d 422, supra, is not controlling on this point.

Appellants claim the order was not lawful because not the result of any procedure authorized by the Public Utility Law, viz., neither a complaint (§1001, 66 PS §1391) nor an investigation by the commission (§1008, 66 PS §1398). The substance of the proceeding should control. The orders were within the powers of the commission as authorized by the Public Utility Law, cf. §§1001, 1008 and 1013 (66 PS §1403), supra.

"Under the Public Utility Law, the Commission is given the power and jurisdiction to grant relief to railroad employees whose personal safety is jeopardized by conditions under which they work. Pa. Railroad Co. v. Pa. P.U.C., 202 Pa. Superior Ct. 114, 195 A. 2d 162 (1963); Reading Co. v. Pa. P.U.C., 188 Pa. Superior Ct. 146, 146 A. 2d 746 (1958)." Erie-Lackawanna R.R. Co. v. Pa. P.U.C., 205 Pa. Superior Ct. 291, 294, 208 A. 2d 908 (1965). The requirements of due process in the form of notice and opportunity to be heard, were complied with. The commission's jurisdiction includes those powers necessary for the exercise of the authority granted in the Act: Duquesne Light Co. v. Pa. P.U.C., 164 Pa. Superior Ct. 166, 63 A. 2d 466 (1949).

Appellants complain that the commission's order of December 19, 1966 exceeds the scope of remand, is a new and different order than that of November 22, 1965, entered without notice and due process, and is not supported by evidence. The December order is also attacked as too broad, allegedly requiring flagging for all trains on all tracks and as containing no exceptions covering station stops, interlocking plants, etc. The petition for remand was understood by all parties to relate to the difficulty in interpreting the order regarding flagging. The petition stated: "It appears that portions of the order as is-

sued are ambiguous and require clarification after the parties are given an opportunity to be heard." Appellants' answer attacked the original order of November 22, 1965 and denied that any clarification was necessary. On remand, hearings were held. Witnesses for the Brotherhoods and for the appellants Reading and Penna. R.R. testified as to the alleged ambiguities relating to flagging on "main and secondary tracks" and "yard limits." The December 19 order was within the scope of remand. The commission may, after notice and opportunity to be heard, modify or rescind previous orders (66 PS §1397). The two orders must be considered together and given a reasonable interpretation. The new order of December 19, 1966 provides that the orders of November 22, 1965 remain in full force and effect insofar as they are not inconsistent with the new order. The single issue in all these proceedings was clear, viz., under what circumstances was flagging protection necessary, under present day conditions, to the safety of the railroads and the public? As the commission points out, such exceptions to flagging requirements as "normal station stops of passenger trains" are clearly covered by the general rule as to "stops under circumstances in which [a train] may be overtaken by another train" since station stops are normally within "interlocking plants" and "absolute block territory." The order of December 19, 1966 is general and permits of exceptions in particular cases and varying conditions. In the light of the complete record disclosing the present and past practices of the railroads, there should be no serious difficulty in applying the December 19 order of the commission. In general, the order defines flagging protection and direct flagging to supplement automatic and other signal systems, subject to certain exceptions or "circumstances" where flagging is not neces-

sary. It does not require flagging of all trains on all tracks as appellants argue.

We do not exercise our independent judgment but only look to see whether the commission's findings are supported by substantial competent evidence: Pittsburgh Rwys. Co. v. Pa. P.U.C., 198 Pa. Superior Ct. 415, 427, 182 A. 2d 80 (1962). Extensive testimony was presented by the Brotherhoods and the railroads as to the need for flagging protection, and as to conditions under which such protection was required. For instance, the I.C.C. records show New York Central R.R. had three false proceed failures in 1964 while the Penna. R.R. had six. The railroads produced expert testimony tending to show that automatic signal systems furnished full protection against rear-end collisions and that flagging was not necessary, but harmful, as the engineman would rely on the flagman rather than automatic signals. The testimony as to the need for flagging protection under various conditions was conflicting and it was the function of the commission to resolve that conflict. There was evidence as to accidents allegedly due to false signals and lack of flagging protection. From the evidence the commission could properly find that "the elimination of flag protection against following trains, as has been effectuated by various carriers in Pennsylvania during recent months . . . has decreased the degree of safety available to the public and to railroad employees, ..." and could properly enter the orders requiring flagging under certain conditions.

Appellants contend that Congress has, under the Interstate Commerce Act (49 U.S.C. §26, 1958) pre-empted the field of protection against following trains in automatic block, manual block, locomotive cab signal, and centralized traffic control territory, so as to preclude state

regulation as to flagging protection. Under the Transportation Act of 1920, as amended, 49 U.S.C. §26, the Interstate Commerce Commission is given the power and has prescribed detailed rules governing block and automatic train stop signal systems. See Sharfman, The Interstate Commerce Commission, Vol. 1, pp. 275-281 (1931). However, the I.C.C. rules presently in force contain no provision as to flagging. 49 C.F.R. 136.1-136.838 (Jan. 1966).

In the absence of legislation by Congress the states are not denied the power to secure safety in the physical operation of railroad trains through their territory: Atlantic Coast Line R.R. Co. v. Georgia, 234 U.S. 280, 34 S. Ct. 829, 831, 58 L. ed. 1312 (1914); Smith v. Alabama, 124 U.S. 465, 481, 8 S. Ct. 564, 31 L. ed. 508 (1888). Recently the C.C.A. 3d, in Monongahela Connecting R.R. Co, v. Pa. P.U.C., 373 F. 2d 142, 148 (1967), affirmed this Court (206 Pa. Superior Ct. 17, 211 A. 2d 113) in conceding the state commission's power to require train line power brakes where cars transporting hot metal shipments were not engaged in "moving interstate traffic." McLaughlin, J., stated: "Where federal legislation admits of a gap the state may pass appropriate laws, to take care of needed protection, which do not conflict with their federal counterparts.", citing Atlantic Coast Line v. Georgia, supra, 234 U.S. 280, and quoting Smith v. Alabama, supra, 124 U.S. 465.

Under the Supreme Court cases there must be an actual conflict between the schemes of regulation so that both cannot stand in the same area: Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443, 444, 80 S. Ct. 813, 4 L. ed. 2d 852 (1960) (city ordinance to abate smoke on vessels). The question whether Congress has so far exercised the exclusive jurisdiction that belongs to

it as to exclude the state, must be answered by a judgment upon the particular case: Head v. New Mexico Board of Examiners, 374 U.S. 424, 83 S. Ct. 1759, 10 L. ed. 2d 983 (1963) (state statute regulating radio advertising). In Brotherhood of Locomotive Eng. v. Chicago, R. I. & P. R. Co., 382 U.S. 423, 86 S. Ct. 594, 15 L. ed. 2d 501 (1966), the Court upheld a state statute providing for a minimum crew, stating (382 U.S. 429): "We first consider the question of pre-emption. Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional legislation on that subject, however, the States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public." We conclude there is no Federal pre-emption so far as the commission's orders relating to flagging in this case are concerned.

Appellants argue that the flagging requirement of the commission's order creates a lack of uniformity, and an affirmative safety hazard, and imposes an unlawful burden on interstate commerce in violation of the Federal Constitution, art. I, §8. Admittedly, however, there is no financial burden on the carriers resulting from the flagging requirement, as the size of the crew remains the same regardless of the rule. The carriers' contention that reliance on flagmen lulls the engineer into a false sense of security and thus creates a safety hazard is opposed by the contrary opinion of other witnesses. Nor is the possible lack of uniformity as to flagging such as materially restricts the free flow of commerce across state lines. Cf. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (statute of state limiting the number of cars on trains

held an undue burden on interstate commerce.) Rather the regulation as to flagging here ordered by the Public Utility Commission is within the state's police power: Terminal R. Association v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 63 S. Ct. 420, 87 L. ed. 571 (1943-state statute requiring cabooses on freight trains). In Erie-Lackawanna R. R. Co. v. Pa. P.U.C., supra, 205 Pa. Superior Ct. 291, 296, 208 A. 2d 908 (1965), we held an order of the commission directing the railroad to cease attaching freight cars behind the caboose was not an unconstitutional burden on interstate commerce, quoting Southern Pacific Co. v. Arizona, supra, 325 U.S. 761 (1945), at pages 770, 771: "There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." See also The Pennsylvania Railroad Co. et al. v. Dept. of Public Commissioners, 49 N.J. 174, 229 A. 2d 505, an opinion of the Supreme Court of New Jersey, filed April 24, 1967, where the State Commissioners' requirement as to flagging in automatic and manual signal territory was sustained on evidentiary and constitutional grounds.

The orders of the commission are affirmed.

VI.

DECISIONS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Complaint Docket No. 18018

Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, Lester F. Gray, W. C. Livengood and W. L. Whitney

v.

The Pittsburgh and Lake Erie Railroad Company

ORDER

By the Commission, November 22, 1965:

This matter is before us upon complaint filed July 22, 1964 by Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania and three individuals, employees of The Pittsburgh and Lake Erie Railroad Company, alleging that a revision of Operating Rule No. 99, effectuated by the railroad on April 26, 1964, which eliminates the requirement that flag protection be provided against following trains or engines by trainmen assigned to trains operating in territory

governed by automatic block signal system rules or by traffic control system rules, constitutes an unnecessary and unreasonable hazard to operating personnel and the traveling public.

Complainants allege that the furnishing of flag protection by qualified personnel has, for many years, been standard operating practice employed by railroads throughout the United States and that such protection is calculated to maintain the high degree of safety for operating personnel and the traveling public, and particularly so, in consideration of the numerous curves and fog conditions common to the main line of the railroad.

Complainants further allege that full and complete reliance by the railroad upon automatic signals or other automatic devices is ill-conceived and ill-advised, since experience has shown that such devices cannot always be relied upon to prevent accidents of the type which manual rear-end flag protection has prevented and is intended to prevent.

Complainants request issuance of an order directing the carrier to reinstitute adequate and proper flag protection throughout that portion of its system within the Commonwealth.

Respondent, in answer filed August 5, 1964, avers that improvements in the quality and performance of its signal systems in recent years have been such as to provide the ultimate protection necessary for safe operation, without flag protection, that by obedience to a stop and proceed signal, the engineer of a following train has all the information needed to avoid and pervent a collision with a standing train ahead under any conditions and denies that hazardous conditions have been created by

reason of the April 26, 1964 revision to the standard flagging rule.

Hearings were held in Pittsburgh on September 8 and 21, and December 8, 1964 and on January 18, 1965, during which complainants submitted 12 exhibits through 8 witnesses and respondent submitted 4 exhibits and 5 witnesses.

Operating Rule No. 99 of The Pittsburgh and Lake Erie Railroad Company, as it was in effect from October 1, 1946 until April 26, 1964, reads as follows:

"99 Protection of Trains.

"When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection. When conditions require he will display lighted fusees and when necessary, in addition, place two torpedoes.

"When recalled and safety to the train will permit, he may return. When conditions require, he will leave the torpedoes and a lighted fusee. The front of the train must be protected in the same way when necessary by another member of the crew. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection.

"By night or by day when the view is obscured, lighted fusees must be thrown off at proper intervals.

"When day signals cannot be plainly seen, owing to weather or other conditions, night signals must

also be used. Conductors and enginemen are responsible for the protection of their trains.

"Note—When trains are operating under Automatic Block Signal System Rules, the requirements of Rule 99, insofar as protection against following trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed.

"Movements on lead extending between the west end of Newell Yard and RC will be made on authority of the Yard Master.

"When main track is used, protection must be provided against all trains and engines as prescribed by the rules except between West End of No. 2 Storage Track 6900 feet west of Walford Freight Station and Walford Freight Station.

"An Oscillating Red Light displayed on rear of train is a signal for approaching trains on all tracks to stop. Trains on all tracks must not pass train displaying Oscillating Red Light until it has been ascertained that track is safe and clear for movement of train.

"The use of oscillating red light does not relieve engine and train crew from prompt and full compliance of Rules 99 and 102 of the Book of Rules.

"Cars or engines must not be coupled to the end of car to which portable oscillating red light is applied unless it is known that there is ample clearance to avoid damage to the light equipment."

The revised rule 99 as published on page 4 of Employee Time-Table No. 15, effective April 26, 1964, reads as follows:

"99 Protection of Trains.

"When a train stops under circumstances in which it may be overtaken by another train, a member of the crew must go back immediately with flagman's signals a sufficient distance to insure full protection. When conditions require he will display lighted fusees and when necessary, in addition, place two torpedoes.

"When recalled and safety to the train will permit, he may return. When conditions require, he will leave the torpedoes and a lighted fusee. The front of the train must be protected in the same way when necessary by another member of the crew. When a train is moving under circumstances in which it may be overtaken by another train, a member of the crew must take such action as may be necessary to insure full protection.

"By night, or by day when the view is obscured, lighted fusees must be thrown off at proper intervals.

"When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used. Conductors and engineers are responsible for the protection of their trains.

"Note—When operating under Automatic Block Signal System Rules or Traffic Control System Rules protection against following train or engine is not required.

"Movements on lead extending between the west end of Newell Yard and RC will be made on authority of the Yard Master."

The company's tracks generally parallel various rivers between Youngstown, Ohio, and Brownsville and Connellsville, Pennsylvania. There are many curves and it is alleged by complainants that the right of way is subject to year round fog conditions. In certain sections, there is a single main track, while in other areas, there are two, three, and sometimes four main tracks.

The signal system comprises automatic signals, interlocking signals, and controlled block signals. The automatic signals are the color light searchlight type, constructed with one, two, or three color light units.

The automatic signals display signal indications which are intended to indicate track conditions beyond the signal location. The system is primarily three aspect, two block signalling which provides a green, clear, or proceed aspect when the two blocks immediately beyond a signal are clear, displays a yellow approach aspect when only the next block is clear and the second block is occupied, and displays a red or stop aspect when the next block is occupied.

The signal indications displayed by automatic signals are initiated or controlled by train movements within the respective blocks.

The interlocking or controlled signals are under the control of an operator in a wayside tower or office. The operator is responsible for establishing the routes authorized for a particular train movement and is governed by field conditions and information conveyed to

him by the track occupancy diagrams in his tower. Field conditions control the signal aspects.

Operating rules require that a train approaching an automatic signal displaying a red aspect must stop and may then proceed at restricted speeds. The carrier's definition of restricted speed reads as follows:

> "Restricted Speed.—A speed not exceeding that which will enable a train to stop short of train, obstruction, or switch not properly lined, look out for broken rails, and not exceeding slow speed."

Slow speed is defined as "a speed not exceeding 15 miles per hour."

A train approaching an automatic signal displaying a yellow approach aspect is required to proceed preparing to stop at the next signal. A train exceeding medium speed (a speed not exceeding 30 miles per hour) must at once reduce to that speed. The reduction to medium speed must commence before passing the signal and be completed before accepting a more favorable signal indication.

According to the railroad's chief engineer, movements on the company's track, where automatic block signal and traffic control systems are in effect, are governed by a total of 412 signals, 357 being in Pennsylvania and the remaining 55 in Ohio, with 269 of these signals being controlled interlocking signals and 143 being automatic signals.

The existing signal locations are based upon their indications being visible to approaching trains for a

minimum distance of 1,000 feet (on a clear day) and providing sufficient braking distance for proper stopping of the maximum tonnage trains, to which predetermined distance, a tolerance figure of 1,500 feet is added.

Commercial power is generally used for energizing the wayside signals and standby power, for use during emergencies, is provided by batteries, constantly on charge. The battery power is also used to energize the signal controls. Failure of commercial power sources results in automatic switching to battery power. Failure of the battery power or the burning out of a signal lamp results in reliance on Operating Rule No. 27 which reads in part as follows:

> "A signal imperfectly displayed or the absence of a signal at a place where a signal is usually shown, must be regarded as the most restrictive indication that can be given by that signal, except that when the day indication is plainly seen, it will govern."

The chief engineer testified that the company's inspection and maintenance procedures for its signal system, in many instances, are more rigid than minimum Interstate Commerce Commission requirements.

The railroad's signal system was installed prior to 1900. Aside from the installation of centralized traffic control systems in certain territories, the most recent major change in the signal system occurred during the years 1939 through 1942 when older semaphore type signals were replaced by color light signals. In addition, distances between signals were increased and many signals were eliminated so as to provide increased distances for the braking of trains and to allow for increased operating speeds.

The chief engineer testified that the company's signal system is extremely adequate and that the system is designed and maintained in compliance with all existing requirements of rules, standards, and instructions of the Interstate Commerce Commission.

The system is designed for "fail-safe" operation which intends that failure of a signal to function normally due to power interruption, broken bond wire, or other cause should result in such signal displaying a more restrictive indication. Malfunctions of signals, when such involves the movement of a train or engine, are classed as "false restrictive" indications or as "false proceed" indications. A "false restrictive" indication is one which displays a signal indication more restricting in its meaning than actual track conditions provide. A "false proceed" signal failure is the failure of a system, device, or appliance to function as intended, which results in the display of signal indications which are less restricting than required. A report of such instances must be furnished to the Interstate Commerce Commission.

According to respondent's witness, the most recent "false proceed" to have occurred on its territory was reported in 1955 and was due to a faulty wire in a signal cable line which was part of a mechanical interlocking which had been in service since 1910. This interlocking was removed in 1958 when traffic control was installed in this territory.

Signal malfunctions which occur on The Pittsburgh and Lake Erie Railroad Company are reported to the Interstate Commerce Commission as part of The New York Central System operations. During the fiscal reporting year ending June 30, 1963, The New York Central System reported a total of 1,550 separate "False Re-

strictive" signals, four "False Proceed" signals and one potential "False Proceed." These statistics include occurrences in states other than Pennsylvania.

The railroad superintendent related the volume of rail traffic as including six Baltimore and Ohio passenger trains between McKeesport and New Castle Junction daily, two Pittsburgh and Lake Erie passenger trains between Pittsburgh and Youngstown, Ohio, Mondays through Fridays, and four Pittsburgh and Lake Erie passenger trains between Pittsburgh and Beaver Falls, Mondays through Fridays. Daily freight traffic averages 14 Baltimore and Ohio trains between McKeesport and New Castle Junction, 20 Pittsburgh and Lake Erie trains west of Pittsburgh, and 10 Pittsburgh and Lake Erie trains east of Pittsburgh. This witness estimated that the number of trains is about half that of 10 years ago.

The following maximum speeds are authorized by the carrier on main line tracks:

West of Pittsburgh—	Passenger trains	65 m.p.h.
	Freight trains	50 m.p.h.
East of Pittsburgh—	Passenger trains	50 m.p.h.
	Freight trains	40 m.p.h.

The superintendent testified as to his personal observations and experience relevant to Rule 99 and revisions thereto during his 42 years of experience.

The witness stated that the railroad continues to assign flagmen to its trains and continues in effect operating Rule 102 which reads as follows:

> "102. When a train is disabled or stopped suddenly by an emergency application of the air brakes

> or other causes, adjacent tracks as well as tracks of other railroads that are liable to be obstructed must, while stopping and when stopped, be protected until it is ascertained they are safe and clear for the movement of trains."

His experience with automatic signal system operations has given him confidence in the signals providing proper protection against following trains and he is of the opinion that the "divided responsibility," as he termed the situation existing under Rule 99 prior to its April 1964 revision, is not desirable. By "divided responsibility," the witness referred to the responsibility for flag protection resting jointly upon flagmen and enginemen operating in automatic block signal territory or traffic control system territory under Rule 99 prior to the April 1964 revision.

We note, however, the effect of carrier's operating Rule No. 106 on this contention, to wit:

> "106. Both the conductor and the engineman are responsible for the safety of the train and the observance of the rules, and, under conditions not provided for by the rules, must take every precaution for protection."

Carrier's Rule 19 provides for the display of marker lamps to indicate the rear of trains, as follows:

> "19. The rear of a train will be identified by marker lamps, one on each side, displayed as follows:
>
> "By day, on cars not equipped with permanent electric marker lamps, marker lamps not

lighted; on engines and cars equipped with permanent electric marker lamps, marker lamps lighted as at night.

"By night, on engines and cars, marker lamps lighted showing red to the rear, except in manual block signal system territory, or non-block territory, marker lamps lighted showing yellow to the rear when train or engine is clear of main track.

"A train not equipped to display the markers prescribed by this rule will display on rear of train; by day, a red flag, by night, a red light.

"Note—Where the rear car is equipped with permanent built-in marker lights, such lights will be used in lieu of standard marker lamps."

The superintendent expressed opinion that the safety of operations has not been impaired by the elimination of flag protection against following movements, as provided by the April 1964 revision of Rule No. 99, and feels that the signal system provides proper protection, and that since this revision there has been no accident where personal injury or property damage had occurred involving a collision between a standing and a following train.

For some years prior to October 1, 1946, when Pittsburgh and Lake Erie Rule No. 99 was modified by the insertion thereto of a note which reads:

"When trains are operating under Automatic Block Signal System Rules, the requirements of Rule

> 99, insofar as protection against following trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed."

the railroad's management insisted that flag protection be afforded at a minimum distance of 35-car lengths to the rear of a train standing on a main line track in automatic block signal territory, and flagmen observed not complying with this interpretation were subject to disciplinary measures. Upon adoption of the October 1946 modification to Rule 99, management then decided that flagmen should be required to provide flag protection against following movements at a distance of 20 car lengths. This requirement was later relaxed in practice and the flagman was not expected to leave the caboose. Respondent's witnesses testified in this proceeding that there was no necessity for flagmen to leave the train to furnish the required flag protection against following trains moving at restricted speeds although such instructions were never issued in printed form.

Reference to Commission accident records reveals that an assistant superintendent of The Pittsburgh and Lake Erie Railroad Company testified during an Interstate Commerce Commission investigation of a rear-end collision which occurred near McKees Rocks on March 21, 1950, that Pittsburgh and Lake Erie flagmen had been instructed that full protection against trains moving at restricted speed is provided when a flagman is not less than 1,000 feet back of the rear of his train if conditions are favorable and, further, if conditions require.

During the period from October, 1946 to April 1964, the superintendent acknowledged that some flagmen con-

tinued to provide flag protection, including the placing of torpedoes on the rails, as required by Rule No. 99.

According to the witness, the adoption of identical revisions to Rule No. 99 by the parent New York Central System in 1946 and 1964 was purely coincidental. It should be noted that operating rules of The Pittsburgh and Lake Erie Railroad Company are those of The New York Central System, being one and the same publication, subject to modification as listed under special instructions in the timetable for the government of employees.

In the event that a flagman, operating in automatic signal territory, under Rule 99 as revised in April 1964, is of the opinion that he should provide rear-end flag protection against following movements, even though not required to do so by the existing rule, there is nothing in the rules to prevent the engineer from recalling him, according to the superintendent, who stated that the carrier, at the present time, had not taken exception to such arrangements and had not revised existing rules pertaining to the recall of flagmen by means of locomotive whistle signals.

Another witness for the railroad (employed for the past 16 years as supervisor of train and engine crews, with prior service as a fireman and engineman) expressed opinions on the matter based on his observations and experiences.

It has been the experience of this witness that locomotive headlights are of sufficient candle power to extend 750 feet in advance of the locomotive although he believes Interstate Commerce Commission standards require a beam approximately twice as powerful. He is of the opinion that night movements through foggy areas

are initially aware of a standing train by the reflection of the headlight upon the wheel treads of the rear car, notwithstanding the presence of illuminated, sometimes flashing type rear-end marker lamps, and also believes that color light signal indications are more definitive in fog than in clear weather conditions, although the preview distance is not increased, with no particular advantage present.

When operating locomotives in automatic block system territory under Pittsburgh and Lake Erie Rule No. 99 as interpreted prior to April 1964, this witness expected to observe a flagman on the ground, after proceeding into a block, at the entrance to which a restricting signal indication was displayed, stated that he placed no reliance on flagmen and relied solely on his personal judgment as to stopping to avoid a collision with a standing train.

He believes that flag protection contributes nothing to safe train operation in automatic signal territory and expressed the opinion that the presence of a flagman does not assist in accident prevention, that the placing of torpedoes on rails has never served any purpose, although admitting that existing rules do require a train to proceed at reduced speed for a distance of one mile after the explosion of torpedoes, regardless of signal indications.

The witness expressed further opinion that a speed of five or six miles per hour is safe for a train moving through fog, on a restricting signal. He believes that a freight train consisting of 162 loaded cars, moving at a speed ranging between 5 and 10 miles per hour, could be brought to a stop within 5-car lengths by an emer-

gency brake application, or within 12- or 13-car lengths, by a service application, pointing out that an emergency application at low speed could prove hazardous to train crew personnel as well as to equipment.

In discussing the use of train line air brakes, the witness appeared uncertain as to the time required but indicated it was either 3 or 3-1/2 seconds for an emergency application to become effective on an entire train, regardless of its length.

Another of the respondent's witnesses (employed as assistant superintendent of labor relations charged with instructing and examining train and engine service employees of the railroad relative to operating rules, timetable special instructions, and the physical characteristics of the railroad) testified to the detail of the examination.

He stated that enginemen and conductors of The Baltimore and Ohio Railroad Company who operate over Pittsburgh and Lake Erie trackage between McKeesport and Baltimore and Ohio Junction, east of New Castle, are also required to be examined by the Pittsburgh and Lake Erie examiner.

This witness interprets the April 1964 revision of Rule 99 as placing sole responsibility for protecting the rear-end of trains, stopped within automatic block signal territory, upon the engineman of following trains, which by rule should not be moving in excess of 15 miles per hour. He expressed opposition to the principle of divided responsibility and feels that it applied to flagmen and enginemen when flag protection is required, while acknowledging the existence of other divided responsibility situations in the operation of a railroad.

The witness also stated that the possibility of rear-end collisions occurring remains to the same degree under the present Rule No. 99, as existing prior to the October 1946 revision of Rule No. 99.

An operating rules examiner, in the employ of The New York Central Railroad System, testified that the flagging Rule No. 99 had been revised system wide by The New York Central System, effective April 26, 1964, by the addition of a note providing for the elimination of rear-end flag protection against following movements in automatic block signal and traffic control system territory. This witness has observed flagmen standing at distances ranging between 15 feet and 60 feet and, on occasion, at greater distances in providing flag protection against following movements expected to be moving at restricted speed and took no exception to the practice. He stated that he had on a single occasion, while employed as a trainman, performed service as a flagman.

He explained that New York Central rules place responsibility for the safe movement of trains jointly upon enginemen and conductors, except that the so-called "dual or divided responsibility" does not relate to rear-end collisions, the engineman being solely responsible for proper handling of the train insofar as use of the locomotive is concerned and of complying with the signal indications.

This witness expressed opinion that although flagmen were required to furnish full protection, including the use of signalling appliances, against following trains by the Pittsburgh and Lake Erie flagging rule prior to the April 1964 revision, he did not feel that the flagmen had any actual responsibility for flag protection, and that the existing interpretation of Rule No. 99 makes for a safer operation by eliminating the engineman's dependence

on the assistance of a flagman, so that the engineman is on the lookout for the train rather than for the flagman. He stressed the importance of immediate compliance with Rule No. 102. Under this rule, a flagman or other trainman should go behind his train as far and as quickly as possible, perhaps three-quarters of a mile or more, and furnish flag protection against trains moving in the same direction on adjacent tracks. Another employee should proceed from the front of the train in the same manner to provide protection for trains proceeding in the opposite direction on adjacent tracks.

All of complainants' witnesses expressed the opinion that the elimination of flag protection in automatic signal territory results in unsafe and hazardous conditions for operating employees.

The record indicates that, on occasion, certain Pittsburgh and Lake Erie conductors have instructed flagmen of their crews to take a forward position on trains, thereby removing these employees from their normal position on the rear of the train, from where they are required to properly furnish the rear-end flag protection which must be provided for adjacent tracks, in the event of emergency stops, in accordance with operating Rule No. 102.

One witness (employed by the railroad as a brakeman and conductor for 23 years) stated that his personal flagging practice remained unchanged over the years until the April 1964 revision, regardless of the changing interpretations placed on Rule 99 by the carrier. He feels that Rule No. 108 which reads:

> "108. In case of doubt or uncertainty, the safe course must be taken."

is paramount in safe train operation.

A telegraph operator (employed by the railroad for 14 years) related observations of "misread" signals while he performed duty as a towerman at Connellsville. He stated that on three occasions, namely, November 17 and 18, 1963 and on January 5, 1964, enginemen had difficulty reading a signal controlled by the towerman, which displayed a red or stop block indication, having interpreted the signal as displaying a yellow or restricting indication and on one occasion the train was operated beyond the signal causing the engine to run through a switch.

Investigation revealed that the sun's rays had been responsible for these "misreadings" and a longer hood has been attached to the signal to shield the color light from the sun.

Another complainant witness (a qualified conductor and trainman for 23 years) recalled that the rules examiner had instructed him, during an examination on flagging qualifications in 1942 or 1943, to comply with Rule 99 as though there were no wayside signals and to provide rear-end protection at a "sufficient distance." He has continued to follow the practice inasmuch as the original instructions have never been altered or rescinded by the rules examiner. He related an experience which occurred during the summer of 1964 wherein two controlled interlocking signals governing separate tracks at McKeesport displayed signal indications which were not properly reflected on the tower operator's panel board due to a malfunctioning of the signal system. The indication received was more restrictive, however, than the tower operator's diagram indicated and this signal was obeyed.

A locomotive engineman (in the employ of the carrier since 1918 and with supervisory experience totaling 15 years) testified to the reduced visibility of the color

light signals during fog conditions and stated that the rear-end marker lamps provide the initial indication of a preceding train.

Based upon his knowledge of train line air brakes and tests conducted thereon by the Westinghouse Air Brake Company, he is of the opinion that an elapsed time of one-tenth second is required for the brakes to become applied to each car of a train, or approximately 16 seconds for a service application throughout a 162 car train. He estimates that the same train, moving at 10 miles an hour could be stopped in a distance of 12 to 14 car lengths, or approximately 700 feet, by an emergency application.

This witness avers that he placed reliance on flagmen furnishing protection against preceding movements, when he operated in blocks which he entered on a stop and proceed signal, and he feels that the elimination of flagging in automatic territory decreases the safety of train operation. He referred to the additional safety provided by torpedoes and fusees, but questions the adequacy of the marker lamps now in use, averring that the modern lamps are less efficient and dependable than those formerly provided by the carrier. He testified that he has observed trainmen providing rear-end flag protection against following movements since April 1964.

He is also of the opinion that the railroad company has a responsibility to its employees and to the public to maintain the practice of flag protection.

Another witness for complainants (employed by the railroad as a brakeman and conductor for approximately 24 years) related the circumstances surrounding an accident which occurred on the Pittsburgh and Lake Erie in August 1957, wherein two locomotives hauling a cabin car

and proceeding on a clear signal, sideswiped the locomotive of a work train which was partially fouling a crossover between an eastbound main track and a westbound main track. Investigation developed that the conductor of the work train crew had aligned a switch for through movements on the westbound track, while the locomotive of the work train was still fouling the westbound track and that rust accumulations on the crossover rails and jack posts had interfered with the track circuits, thereby affecting the automatic signal on the westbound track.

Three additional trainmen, employed by The Pennsylvania Railroad Company, presented rebuttal testimony on behalf of complainants. Each related their respective experiences in providing flag protection against following movements which collided with standing trains. One instance involved the furnishing of protection to adjacent tracks following a collision at or near Leetsdale, Pennsylvania, a second instance involved movements on a secondary track, signalled only at either entrance and on which flagging was not required by rule and the third accident occurred on a track not protected by automatic wayside signals but only by cab signals installed in locomotives to indicate track conditions in much the same manner as wayside signals, and in territory where flagging was required at the time of the collision.

We have no evidence before us indicating that the rule change here involved has resulted in any reductions in the size of respondent's train crews nor that any such reduction is contemplated. The carrier apparently continues to assign brakemen to the respective crews in the same quantity as prior to the April 1964 change in Rule 99.

It appears that the automatic signal system installed on The Pittsburgh and Lake Erie Railroad, as outlined in this record, is adequate for safe movements with its "fail-safe" construction. However, we are not impressed with respondent's contention that the abolishment of rear-end flagging results in a safer condition, nor with the concern expressed by several witnesses about the so-called "divided responsibility" or "dual responsibility" theory supposedly existing where flagging is practiced. Flagging, properly performed, certainly serves a vital purpose. As stated by complainants in their brief, good and sufficient reason for the rule change has not been shown conclusively in this proceeding.

Respondent, in its brief, contends that the real function of a train flagman became meaningless in view of the general laxity in instructions and enforcement of the 1946-1964 version of Rule 99 and a wide variation in individual methods of employee compliance with the rule.

We are concerned chiefly as to whether adequate protection and safety would continue under the revised Rule 99 and we would be remiss in our concern for safety should we ignore the function of train flagmen.

The evidence would appear to indicate that a trainman, providing flag protection, is an added safety factor so long as he is available to give additional warning and in the prevention of an accident in the event an engineman, possibly alone in a locomotive cab, misreads a signal. Wayside signals could possibly be subject to damage from protruding ladings thereby causing malfunction and the display of false proceed indications, as well as the intended false restrictive indications.

It appears that many railroads, having installed a near perfect system of block signals, have destroyed its effectiveness by establishing the "permissive block" whereby a following train is given discretionary power to run into a block already occupied. Exceptions are made to the intent of "stop and proceed" indications in the case of trains exceeding certain tonnage requirements and operating on ascending grades, whereby such trains are not required to stop prior to entering occupied blocks but proceed on restricted speed.

We must wonder whether the established rules have been diluted and watered down by amendments and revisions to such an extent as to make it very difficult for employees simultaneously to meet the requirements and obey the rules.

Assuming a signal failure or malfunction resulting in the so-called "false proceed" circumstances (which has happened infrequently) a flagman going back a "sufficient distance" behind a standing train could certainly assist materially in warning a following movement, regardless of the rate of speed, of the presence of a train ahead, by his presence on the ground, the placing of torpedoes, and the display of flags, lamps and fusees, and it is the opinion of this Commission that such secondary protection should continue to be available.

The flagman must take into consideration grades, curves, and condition of the rail and weather in determining the distance he must go back to properly protect his train.

It is the primary responsibility of the carriers to provide safe and adequate service to the public, but it

is the duty of this Commission to see that the carriers fulfill that obligation.

We are of the opinion that the revision of P & L E Rule No. 99 impairs and jeopardizes the safety of the public and railroad employees and that reasonable safety of the traveling public as well as railroad employees and operations requires the retention of flag protection for a train moving under circumstances in which it may be overtaken by a following train and for a train which stops under circumstances in which it may be overtaken by a following train.

Therefore, we shall direct The Pittsburgh and Lake Erie Railroad Company to conform its Operating Rules with Rule 16 of the Railroad Regulations adopted this date.

Upon full consideration of the matters and things involved, we are of the opinion and find that the elimination of flag protection against following trains operating under automatic block signal systems, as effectuated by The Pittsburgh and Lake Erie Railroad Company by a revision to its Operating Rule No. 99, effective April 26, 1964, has decreased the degree of safety available to the public and respondent's employees, and that continued adherence to the existing no flagging practice would seriously impede efforts to increase railroad safety and serve to decrease the margin of safety provided for rail operations; Therefore,

It Is Ordered:

1. That the instant complaint be and is hereby sustained.

2. That The Pittsburgh & Lake Erie Railroad Company forthwith require that passenger and freight trains on its line of railroad within the Commonwealth be operated in a manner consistent with Rule 16 of the Commission's Railroad Regulations.

Pennsylvania Public Utility Commission
(signed) George I. Bloom
Chairman

Attest:

Secretary

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition 7

In re: Petition of Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, C. J. Sludden, W. P. Fullerton and W. D. Smith—For a regulation or regulations requiring that a member of the crew must go back immediately with proper flagging equipment a sufficient distance to insure full protection when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab, automatic block or manual block system rules.

ORDER

By the Commission, November 22, 1965:

This matter is before us upon petition filed October 26, 1964 by Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, C. J. Sludden, chairman, and a trainman retaining seniority rights on Monongahela Connecting Railroad Company, W. P. Fullerton and W. D. Smith, both local lodge officers of Brotherhood of Railroad Trainmen and trainmen in the employ of The Pennsylvania Railroad Company.

Petitioners allege that the elimination of flag protection for stopped trains, as has been effected by the action of some railroads in the Commonwealth in revising pertinent operating rules, creates an unreasonable risk of harm to train crews and to the traveling public. Petitioners further allege that the elimination of flag protection has resulted in injury and death and are of opinion that the inherent danger is such that a regulation prohibiting the elimination of flagging should issue before the lack of proper protection becomes more widespread and before further injury or fatality. Petitioners request that the Commission promulgate a regulation requiring that a crew member must go back immediately with proper flagging equipment a sufficient distance to insure full protection, when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab signals, automatic block signals, or manual block signal system rules.

Answers were filed by individual railroads during the period from November 12, 1964 through January 15, 1965. General denials of petitioners' allegations were entered by:

Norfolk and Western Railway Company
The Baltimore and Ohio Railroad Company
Bessemer and Lake Erie Railroad Company
McKeesport Connecting Railroad Company
The Pittsburgh and Lake Erie Railroad Company
Reading Company
Western Allegheny Railroad Company
Pittsburgh, Chartiers and Youghiogheny Railway Company

The Monongahela Railway Company
Youngstown and Southern Railway Company
Montour Railroad Company
Erie-Lackawanna Railroad Company
The Central Railroad Company of New Jersey
The Pennsylvania Railroad Company
The Dela are and Hudson Railroad Corporation
The New York Central Railroad Company

However, four additional carriers; namely,

Lehigh Valley Railroad Company
Western Maryland Railway Company
Union Railroad Company
The Pittsburg and Shawmut Railroad Company

deny that their lines had effected any change in their respective flagging requirements, while The Monongahela Connecting Railroad Company and Aliquippa & Southern Railroad Company aver that operations on its lines are limited to yard and switching movements to which flagging rules are not applicable. The New York Central Railroad Company further alleges that the Commission lacks jurisdiction in the premises. The Pittsburg and Shawmut Railroad Company on March 26, 1965 filed a motion to dismiss the petition.

Hearings were held in Harrisburg on February 8, 9, and 10; March 8, 9, 10, 11, 12, 29, and 30; and in Philadelphia on April 13, 14, 15 and 23, 1965, during which 42 exhibits were submitted through 70 witnesses. Oral argument was heard by the Commission on July 27, 1965, at which all counsel desirous of arguing their respective positions appeared.

For many years it was the custom and practice of all railroads operating within Pennsylvania to require, generally by application of Rule 99, that stopped trains be protected against following movements by flagmen with flagging equipment, and the carriers have considered this rear-end flag protection essential to safe operation.

The distance at which rear-end flag protection should be furnished is necessarily dependent upon the physical characteristics of the line of railroad, the topography, curvatures and grades, and current weather and atmospheric conditions.

Flagmen operating under old Rule 99 were expected to secure torpedoes to the rail and to display burning fusees, flags, and illuminated hand lamps when necessary, supplementing the basic traffic control system, whether it be manual block signals, automatic block signals, or locomotive cab signals.

Automatic signalling by the use of track circuits was first developed in 1872. The underlying principle of track circuiting is its ability to detect and register the presence of a train, engine, or car on a track. These circuits are also designed so as to detect a broken rail, an open switch, or an open drawbridge.

An automatic track signalling system is designed on a "fail-safe" principle, whereby any break in or shunting of a track circuit will actuate a restrictive signal aspect. It is possible that deposits of foreign matter, such as sand, rust and grease on rails or on engine or car wheels may interfere with the intended circuit shunting. Undesired electrical connections between control circuits of associated signals may cause "false-proceed" signal aspects to be displayed and, in addition, certain light weight track

maintenance and inspection equipment will not ordinarily shunt track circuits.

Trains or engines operating in manual block territory are governed by a signal indication displayed at the entrance to a block, which may extend for a considerable distance, possibly 50 miles, whereas in automatic signal territory, signals are spaced at intervals, generally not exceeding 2 miles apart.

Flag protection remains an operating requirement in manual block territory of most carriers. Exceptions are Lehigh Valley Railroad Company and those portions of The Pennsylvania Railroad Company designated in employee timetable as "absolute" block territory.

Preliminarily, there was a motion to dismiss filed by the Pittsburg and Shawmut Railroad, denying that any rule would be applicable to it, in view of the fact that it had not made any changes in the original Rule 99 requiring flagging under the circumstances referred to above. The other railroads responded on the merits and generally urged the Commission to dismiss the petition. One railroad, New York Central, did raise in its answer the question of our jurisdiction.

Further, the respondent railroads contend that the petition should have been dismissed because it did not invoke a procedure authorized by the Public Utility Law and, consequently, that the Commission lacks jurisdiction. The respondents alluded to Section 1001 relating to complaints, 66 P.S. §1391, and Section 1008 relating to investigations, 66 P.S. §1398, and aver that the petition here is neither a complaint nor a pleading which initiated an investigation; nor could it be, they aver, classified as a complaint because it was not filed by a "person" pur-

suant to Section 1001 and, furthermore, because its own style indicates that it is a "petition" rather than a complaint.

It is our opinion that the position of the respondents concerning our procedure and jurisdiction is without merit. This matter is not to be determined by the genesis of the case nor by the title, caption, or style given to the pleadings filed.

Our jurisdiction includes those powers necessary and proper for the exercise of the specific powers enumerated in the Public Utility Law. See Duquesne Light Company v. Pa. P.U.C., 164 Pa. Superior Ct. 166.

The procedure followed in this case amounted to a consolidated complaint proceeding. If separate complaints had been required against each railroad, the records would have become cumbersome and unwieldy by reason of the necessary cross-incorporations by reference. The procedure herein eliminated unnecessary expense and duplication and at the same time gave all parties an opportunity to be heard. If anything, the procedure may have been unfair to the complaining petitioners, not to respondents, since the cross-examination by counsel for the railroads provided the latter with a group approach, allowing all of their legal talent to be coordinated and aimed against the Brotherhoods' witnesses—what one railroad may have overlooked, the other would remember or note for the benefit of all.

Moreover, under the holding in Penna. R. Co. v. Pa. P.U.C., 396 Pa. 34, we could have issued this rule even without prior hearing, and no appeal could have been taken until after the regulation had been applied to a

specific railroad. We have, therefore, gone further than was strictly required by law by our hearings in this case.

Furthermore, under Section 1013, 66 P.S. §1403, we are specifically empowered to conduct "such other hearings," though informal, "as may be required in the administration of the powers and duties conferred" on this Commission. The fact that we proceeded herein with unrequired formality does not nullify our express power to secure the facts necessary to administer the Public Utility Law and the full intent thereof.

The record does not indicate that the elimination of flag protection has yet resulted in any wholesale reduction in the size of train crews or that the revised rule will result in any financial savings to the carriers.

The operation of today's lengthy and heavy tonnage trains at extremely slow or creep speeds is at times difficult to accomplish, hence there is permitted a variance in the requirement that trains actually stop at a "stop and proceed" signal indication, at specified "grade" or "tonnage" signal locations due to excessive grades.

One carrier, Erie-Lackawanna Railroad Company, has revised its flagging rule so as to eliminate flag protection in automatic signal territory, except that:

> "1. All trains carrying passengers must be both protected and protected against.
>
> "2. When unusual atmospheric conditions prevail, such as heavy rain, snow, fog and smoke which unduly restrict normal visibility, protection must be provided by and for all trains."

Carrier witnesses repeatedly contend that the removal of a properly functioning flagman results in a greater degree of safety for rail operations in any territory.

For decades railroad companies operating in the Commonwealth have required flag protection and have insisted upon strict compliance with the flagging rule. Now, during recent months, the carriers collectively have effectuated revisions to the standard rule but have presented no convincing evidence of recent innovations in the methods of railroad signalling and contend that their basic concern is the elimination of "divided responsibility," the elimination of train delay in awaiting the return of flagmen and the freeing of flagmen for other duties.

The operating rules of the respective railroads vary with respect to flag protection, as shown by the following:

Flag protection against following movements on the same track in automatic block signal territory and in manual block territory has been eliminated by

Lehigh Valley Railroad Company

The Pennsylvania Railroad Company (in absolute block, manual block territory)

Flag protection against following movements on the same track in automatic block signal territory has been eliminated by

Bessemer and Lake Erie Railroad Company

The Delaware and Hudson Railroad Corporation

The New York Central Railroad Company

The Pittsburgh and Lake Erie Railroad Company

Reading Company

and is proposed to be eliminated by

The Baltimore and Ohio Railroad Company

Erie-Lackawanna Railroad Company

Union Railroad Company

Flag protection against following movements is required under certain circumstances by

The Central Railroad Company of New Jersey

Erie-Lackawanna Railroad Company

Rule requiring flag protection against following movements has not been revised by

The Monongahela Railway Company

Montour Railroad Company

The Pittsburg and Shawmut Railroad Company

Western Allegheny Railroad Company

Youngstown & Southern Railway Company

The Pittsburgh, Chartiers & Youghiogheny Railway Company has not established a flagging rule for its operations.

As reiterated by numerous witnesses, an engineman observing a stop and proceed signal indication is put on notice to observe the track ahead for occupance by a train or other obstruction, whether or not flagging is required by rules, and must control train speed so as to stop within his range of vision.

A number of managerial level witnesses appearing in behalf of respondents expressed their opinion that the elimination of flagging against following movements on the same track in automatic block signal territory provides a safer operation, that flagging is not required at interlocking plants, railroad grade crossings where conflicting movements occur, nor in traffic control territory where opposing movements rely solely on signal protection and compliance with the rules by the engineer.

Testimony was presented relative to the design, construction, and maintenance of an automatic block signal

system, including the "fail-safe" principle, whereby a failure of the system would cause the display of a more restrictive signal aspect than is warranted by track conditions.

Operating rules generally provide that the absence of a signal at a location where a signal is usually displayed, or an improperly displayed signal, require that an engineman must act as though he had received the most restrictive aspect possible at the particular location.

The spacing of signals is related to fixed points such as interlockings, terminals and railroad crossings, at grade. Other considerations include visibility, grade, curvature, type of rail, maximum speeds, and braking distances. In addition, signals must meet requirements established by the Signal Inspection Act, under which the Interstate Commerce Commission promulgates rules, standards, and instructions governing the construction, installation, testing, and maintenance of signals and signal systems.

The Interstate Commerce Commission requires that railroads file with that agency monthly reports of signal malfunctions, classified as "false proceed" failures and as "false restrictive" failures. These reports are compiled on a system basis and we are unable to determine the frequency of such malfunctions occurring within Pennsylvania. The available information indicates that on railroads of the United States a total of 58 false proceed failures occurred during the fiscal year ending June 30, 1964.

False restrictive failures occur far more frequently and have the effect of slowing or delaying train movements. For example, The Pennsylvania Railroad Com-

pany reported 2,422 such failures during 1964 on its system.

For nearly 20 years, The New York Central, Pittsburgh and Lake Erie, and Pennsylvania Railroad Companies have operated with a modified Rule 99, to the extent that flagmen were then required to protect against following movements at restricted speed. Counsel for these carriers make the averment in a jointly filed brief that the time for petitioners to attack the placing of full reliance on automatic signals has long since expired on these lines, and consequently on all railroads.

A number of petitioners' witnesses indicated that the handling and stopping of trains moving at restricted speeds is difficult and that the physical characteristics of the railroad and unfavorable atmospheric conditions serve to limit the visibility available to an engineman and contend that the use of torpedoes and fusees by a flagman could be very beneficial, in fact, very essential to safe operation.

There is testimony concerning the so-called "grade" or "tonnage" signals which are specific automatic signals, identified in various ways on different railroads. Though these grade signals may display a stop and proceed aspect, such indication need not be accepted as such under certain circumstances. Trains meeting specified tonnage and train length capacities may accept such signals, which are generally located on ascending grades, as displaying the more favorable restricting aspect, so as to retain momentum and avoid possible stalling or inability to move, if stopped at such signal.

Operating rules of Bessemer and Lake Erie Railroad permit trains to enter occupied blocks without stopping at the entrance of such block.

Witnesses for petitioners related their individual experiences with various signal failures and malfunctions, several of which incidents were disclaimed by witnesses for the particular carrier involved, while other occurrences were confirmed by carrier investigations.

Flagging rules of the various railroads continue to require full flag protection in manual block territory, in view of the varying length of manual blocks, which may extend for 25 or more miles. Exceptions are found on Lehigh Valley Railroad Company, which does not require flag protection in manual block territory, under normal circumstances, and on The Pennsylvania Railroad Company, which line does not require flag protection in "absolute blocks" which are designated by special timetable instructions. Under normal operating conditions, trains are not permitted to enter an occupied block under "absolute block" rules, although exceptions are made in emergency situations and protection in this case is afforded by train order.

Testimony was presented to indicate that some degree of confusion and difference of opinion exists among operating and supervisory employees relative to the flagging rule modifications and their application on specific portions of a railroad.

Determination as to the designation of specific tracks as absolute block or permissive block territory is dependent upon the frequency and volume of rail traffic on the particular line of railroad.

Varying methods of operation and promulgation of special instructions for certain sections of track add to the complexities of railroading and demand properly qualified and experienced operating personnel.

The Lehigh Valley Railroad Company manual block system rules apply only on two isolated branches in Pennsylvania, the twenty-one mile State Line and Sullivan Branch and the two and one-half mile Auburn Branch. Train movements on the former are limited to about three per week, with no opposing or following train movements, and most of the Auburn Branch is within yard limits and following movements are rare.

Carrier witnesses advance the argument that enginemen relying on the presence of flagmen may relax their vigilance and tend to operate in excess of authorized speeds. Respondents further contend that sole responsibility for rear-end collisions should rest upon the enginemen of following trains and that compliance with the rules will avoid collisions.

Respondents aver that petitioners' allegations are not supported by the record herein and that elimination of rear-end flag protection provides operations as safe as or safer than under the former rules which required rear-end flagging without exception.

Various witnesses for the railroads testified to the effect that modifications to the flagging rules have been under consideration for some time and are intended solely to provide improved safety.

As we stated in order issued June 25, 1962 at C. 17733, we would be remiss in our concern for railroad safety should we fail to take notice of the function of train flagmen, since protection of trains is of prime importance. The testimony herein and information of record indicates to us that the positioning of a qualified trainman at the rear of trains where he is available to provide immediate rear-end flag protection, augmenting that furnished by

signals, be they manual or automatic, remains an essential and desirable practice.

The collective testimony and evidence of record does not provide a basis for our finding that the almost total elimination of flag protection by the railroads of Pennsylvania is a progressive step forward in the field of safety.

Undoubtedly, automatic signalling functioning as intended, as the record indicates it does nearly 100 per cent of the time, augmented by locomotive cab signals, automatic train-stop devices, two-way radio and telephone communication facilities, and the existence of tangent track throughout a rail system along with constantly clear daylight weather, would present conditions and circumstances whereby manual flag protection would be of minimal benefit in furnishing protection against following trains on the same track. However, in consideration of the realities, present day railroad operation does not attain this utopian ideal.

Operating rules continue to require that flag protection be furnished immediately, in either direction, on tracks adjacent to the track occupied by a train which comes to an emergency stop or when adjacent tracks are known to be obstructed in any manner so that the repeated concern expressed by carrier witnesses relative to dividing responsibility between flagmen and enginemen is unimpressive and we are not convinced that the railroads have shown conclusively in this proceeding that good and sufficient reason exists for this rule change.

The "permissive block" principle in use both in automatic block and manual block territory appears to diminish the intended effectiveness of block signals, and exceptions are established for "stop" and "stop and proceed"

signal indications, permitting certain tonnage trains to enter occupied blocks without first being brought to a stop.

It is the opinion of this Commission that elimination of the protection furnished by a properly functioning flagman impairs and jeopardizes the safety of the public and railroad employees and that reasonable safety of operations requires the retention of flag protection for a train moving under circumstances in which it may be overtaken by a following train and for a train which stops under circumstances in which it may be overtaken by a following train.

Therefore, we shall direct the railroads operating in the Commonwealth of Pennsylvania to require flag protection against following trains on the same track.

Upon full consideration of the matters and things involved, we are of the opinion and find that the elimination of flag protection against following trains, as has been effectuated by various carriers in Pennsylvania during recent months, by the revision of the operating rules governing flagging, has decreased the degree of safety available to the public and to railroad employees, and that continued adherence to the "no flagging" practice would seriously impede efforts to increase railroad safety and serve to decrease the margin of safety provided for rail operations; Therefore,

It Is Ordered:

1. That the prayer of Petition No. 7 be granted.

2. That the motion to dismiss the petition filed March 26, 1965 by The Pittsburg and Shawmut Railroad Company be denied.

3. That all railroads operating in the Commonwealth of Pennsylvania, within 30 days of service hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees so as to require that flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment, for trains moving on main or secondary tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circumstances in which they may be overtaken by following trains, in manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories, except within the limits of interlocking plants, at stations where passenger trains are making normal station stops, within the limits of a classification or storage yard and manual block territory protected by an absolute block.

Note: When trains are operating under automatic block signal system rules (locomotive cab signal or centralized traffic control signal rule), the requirements of flagging, insofar as protecting against following trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed.

4. That the above requirement be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof.

Pennsylvania Public Utility Commission

(signed) George I. Bloom
Chairman

Attest:

Secretary

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition 7 and Complaint Docket No. 18018

In re: Petition of Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, C. J. Sludden, W. P. Fullerton, and W. D. Smith—For a regulation or regulations requiring that a member of the crew must go back immediately with proper flagging equipment a sufficient distance to insure full protection when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab, automatic block or manual block system rules.

C. 18018—Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, Lester F. Gray, W. C. Livengood, and W. L. Whitney v. The Pittsburgh and Lake Erie Railroad Company.

ORDER

By the Commission, December 19, 1966:

In executive session, held on March 7, 1966, this Commission moved to petition the Superior Court for remission of the record in these proceedings, in consideration of the incidents of noncompliance, confusion, and multiplicity of interpretation by the various carriers and the petitioners at P. 7, of the new Rule 16 of the Commission's Railroad Regulations, adopted November 22, 1965.

Rule 16 directs that all railroads, operating in Pennsylvania within 30 days of service thereof, promulgate appropriate operating rules and instructions for the government of their respective employees so as to require that rear-end flag protection be provided against following trains.

On March 15, 1966, the Court remanded the case for further hearing and/or oral argument and reconsideration and directed that, upon entry of an order by the Commission, the record be returned forthwith to the Superior Court.

Further hearings were held May 12, and July 7, 1966 at Harrisburg and briefs subsequently were submitted by Lehigh Valley Railroad Company, The Pennsylvania Railroad Company, Reading Company, and Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania et al.

Commencing in early January 1966 and continuing until the present time, the Commission has been furnished with advice which indicates that adherence to Rule 16 lacks uniformity and on some railroads is practically nonexistent and, in several instances, is thwarted by misunderstanding as to what is meant by the phrase "standard flagging equipment."

The record further indicates that some confusion has resulted from the wording contained in paragraph 3 of our order, "* * * for trains moving on main or secondary tracks * * *"; and also our phrasing "* * * within the limits of a classification or storage yard * * *."

In addition, several carriers have seen fit to apply to the new Rule 16 the reference to "main track" which appears in Part I (Definitions) of the Commission's Rail-

road Regulations. This definition, which relates to minimum clearance standards, previously adopted, reads as follows: "Main Track on which authorized speed of freight trains is 25 miles per hour or less will be considered as yard track," and the application of same to the matter of flag protection appears to be an unwarranted distortion of the intent of our rule.

In respect to the carriers' contention of lack of understanding of our phrase, "standard flagging equipment" there appears to be little, if any, merit to this position. Had we suspected that the carriers, who for decades have furnished all necessary flagging equipment for use of their employees, where required by their operating rules, would have, at this late date, raised such a question we could have been more explicit. However, there should be no doubt in any reasonable mind that the flag protection required should be furnished by the use of industry-recognized flagging equipment; namely, a red flag, torpedoes and fusees by day, a red and/or white light or a light capable of producing both aspects, and torpedoes and fusees by night.

Furthermore, upon review of the supplemented record and reconsideration of all pertinent facts contained therein and the pleadings of the various respondents, we are convinced that our finding, as propounded in the November 22, 1965 order; viz., that the safety of the public and of railroad employees requires flag protection under all circumstances, when a train is stopped or when a train is moving under circumstances in which it may be overtaken by another train, is reasonable and well supported by the record, that the basic requirements of our order are in the general interest of the public and should not be materially disturbed. However, in order to eliminate the

apparent confusion and misinterpretation of certain diction used in our existing order, flagging should be performed on main tracks, secondary tracks, or on any tracks used for the movement of trains, where a train, stopped or moving, may be overtaken by another train, whether within a yard proper; adjacent to the entrance to a yard; or in areas designated by a railroad as yard limit territory.

In the circumstances, and being satisfied that the proposed changes are in the interest of safety, and in the public interest generally, we find and determine that our order issued November 22, 1965 in the Petition 7 proceeding should be modified and it also follows that our findings in C. 18018 should be modified. We are further of the opinion and find that the proper rule to be placed in effect and rigidly enforced and adhered to is Rule 99 as it existed prior to 1945; Therefore,

It Is Ordered:

1. That numbered Paragraph 3 on page 13 of our order issued at P. 7, November 22, 1965, which reads as follows, to wit:

> "3. That all railroads operating in the Commonwealth of Pennsylvania, within 30 days of service hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees so as to require that flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment; for trains moving on main or secondary tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circum-

stances in which they may be overtaken by following trains, in manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories, except within the limits of interlocking plants, at stations where passenger trains are making normal station stops, within the limits of a classification or storage yard and manual block territory protected by an absolute block.

"Note: When trains are operated under automatic block signal system rules (locomotive cab signal or centralized traffic control signal rule), the requirements of flagging insofar as protecting against following trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed."

be and is hereby modified to read as follows:

3. That all railroads operating in the Commonwealth of Pennsylvania, within 45 days of service hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees in conformity with the following:

(a) When a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and/or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail and when necessary, in addition, display lighted fusees.

(b) When recalled and safety to the train will permit, he may return.

(c) When conditions require, he will leave the torpedoes and a lighted fusee.

(d) The front of the train must be protected in the same way, when necessary, by a member of the crew.

(e) When a train is moving under circumstances in which it may be overtaken by another train, a member of the crew must take such action as may be necessary to insure full protection. By night (or by day, when the view is obscured) lighted fusees must be dropped off the moving train or displayed at proper intervals.

(f) When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used.

(g) Conductors and enginemen are responsible for the protection of their trains.

(h) When a pusher engine is assisting a train, coupled behind the cabin or caboose car, and the member of the crew who protects the rear-end of the train is riding in the cabin or caboose car, the requirements as to the use of fusees will be met by dropping them off between the cabin or caboose car and pusher engine on the track the train is using, and not between that track and an adjacent track.

2. That numbered paragraph 4 on page 13 of our order issued at P. 7, November 22, 1965, which reads as follows, to wit:

"4. That the above requirement be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof."

be and is hereby modified to read as follows:

4. That the above-revised paragraph 3 be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof.

3. That numbered paragraph 2 on page 18 of our order issued at C. 18018, November 22, 1965, which reads as follows, to wit:

> "2. That The Pittsburgh and Lake Erie Railroad Company forthwith require that passenger and freight trains on its line of railroad within the Commonwealth be operated in a manner consistent with Rule 16 of the Commission's Railroad Regulations."

be and is hereby modified to read as follows:

> 2. That The Pittsburgh and Lake Erie Railroad Company forthwith require that passenger and freight trains on its line of railroad within the Commonwealth be operated in a manner consistent with Rule 16 of the Commission's Railroad Regulations as revised this date.

4. That in all respects not inconsistent herewith, our orders issued November 22, 1965, at P. 7 and at C. 18018, remain in full force and effect, and that the record herein be returned to the Superior Court of Pennsylvania forthwith.

Pennsylvania Public Utility Commission
(signed) George I. Bloom
Chairman

Attest:

Secretary

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 12 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 638

CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,

Petitioner,

v.

BESSEMER and LAKE ERIE RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

T. P. SHEARER,
1801 Grant Building,
Pittsburgh, Pa. 15219.

G. P. MacDOUGALL,
705 Ring Building,
Washington, D. C. 20036,
Attorney for Petitioner.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5022 CARLYN DRIVE, PITTSBURGH, PA., 15236,
412-881-7453.

INDEX.

	PAGE
Opinions of the Courts Below	2
Jurisdiction	2
Question Presented for Review	2
Statutes Involved	3
Statement of the Case	3
The Reason for Allowing Certiorari	6
Argument	8
Congress, in enacting Section 25 of the Interstate Commerce Act, did not preclude state regulation requiring protection of trains against following train movements for the reasons: Congress did not manifest an intention to do so; the state regulation does not, in its terms or in its administration, conflict with Section 25 or infringe upon its policy; and there is no sound basis under applicable principles to infer pre-emption	8
Conclusion	20
Appendix I—New Jersey Opinion	21
Appendix II—Letter, dated July 12, 1967, from Robert W. Ginnane, General Counsel, Interstate Commerce Commission, to Richard N. Clattenburg, Esq.	33
Appendix III—Letter, dated July 31, 1967, from H. R. Longhurst, Acting Director, Bureau of Railroad Safety, Department of Transportation, to Mr. Richard N. Clattenburg, General Attorney	35
Appendix IV—Boiler Inspection Act, § 23	36
Appendix V—Interstate Commerce Commission Order No. 29543	36
Appendix VI—Railroad Accident Investigation Report No. 4135	37

TABLE OF CASES.

Buck v. California, 343 U. S. 99 (1952) reh. den. 343 U. S. 932	10

PAGE

Central Illinois Public Service Co. v. Illinois Commerce Commission *ex rel.* Illinois Central Railroad Co., 18 Ill. 2d 506, 165 N. E. 2d 322 (1960) 12
Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U. S. 714, 772 *et seq.* (1963) 10
In Re Complaint of Brotherhood of R. R. Trainmen v. Public Utility Commissioners of New Jersey, 49 N. J. 174, 229 A. 2d 505 (1967) 12
Florida Lime and Avocado Growers Inc. v. Paul, Director of Dept. of Agriculture of California, 373 U. S. 132, 142 (1963) 10
Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440, 443 (1960) 10
Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605 (1926) 13
Pennsylvania Railroad Company *et al.* v. Board of Public Utility Commissioners, *et al.*, 49 N. J. 174, 229 At. 2d 505 ..... 6, 7
Southern Pacific Co. v. State of Arizona *ex rel.* Sullivan, 325 U. S. 761, 766 (1945) 9

STATUTES.

Locomotive Boiler Inspection Act, 45 U. S. C. § 23 13
Railroad Block Signal Act 4, 14, 18
paragraph (e) 15
Section 25(f) 18
paragraph (c) 18
Section 25 of the Interstate Commerce Act, 49 U. S. C. Section 26 ..... 2, 3, 4, 6, 8, 9, 11, 12, 20
Sections 401, 413, 901, 902 of the Public Utility Code, 66 Purdon's Stat. Ann. §§ 1171, 1183, 1341, 1342, Act of May 28, 1937, P. L. 1053 ..... 3, 4
28 U. S. C. 1257(3) 2

RULE.

Rule 99 3

MISCELLANEOUS.

15 Am. Jur. 2d, Commerce Sec. 24 15

IN THE

Supreme Court of the United States

October Term, 1968

No.

CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,

Petitioner,

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above cause. Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, was an intervenor before the Superior and Supreme Courts of the Commonwealth of Pennsylvania. The Co-Operative Legislative Committee joins in the Petition for a Writ of Certiorari heretofore filed on August 26, 1968 at Number 443

October Term, by the Pennsylvania Public Utility Commission, relies on the record therein and files this Petition on its own behalf.

Opinions of the Courts Below

The opinion of the Superior Court of Pennsylvania is reported at 210 Pa. Superior Ct. 7, 232 A. 2d 220 (1967) and is printed in full in the Supplemental Appendix to the Pennsylvania Public Utility Commission Petition as Appendix V, to which reference is made.

The opinion of the Supreme Court of Pennsylvania is reported at 430 Pa. 339, 243 A. 2d 358 (1968) and is printed in full in Appendix I to the Petition of the Pennsylvania Public Utility Commission, as is the order of the Supreme Court of Pennsylvania denying the petition for reargument as Appendix II. To both of these Appendices reference is made.

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on May 21, 1968. The order of the Supreme Court of Pennsylvania denying the petition of Pennsylvania Public Utility Commission for rehearing was entered on July 15, 1968.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Question Presented for Review

Did the Supreme Court of Pennsylvania err in holding that Section 25 of the Interstate Commerce Act, 49 U. S. C. Section 26, dealing with the installation of block signal

systems completely occupied the field and pre-empted all state regulation dealing with flag protection?

Statutes Involved

Section 25, Part I of the Interstate Commerce Act, as amended, 49 U. S. C. § 26 (printed at length in the Petition of the Pennsylvania Public Utility Commission in Appendix III, to which reference is made).

Sections 401, 413, 901, 902 of the Public Utility Code, 66 Purdon's Stat. Ann. §§ 1171, 1183, 1341, 1342, Act of May 28, 1937, P. L. 1053 (printed at length in the Petition of the Pennsylvania Public Utility Commission in Appendix IV, to which reference is made).

Statement of the Case

For almost 100 years the railroads in the United States had included within their operating rules an almost standard provision known as Rule 99, which provided that a member of the crew must go back immediately with proper flagging equipment a sufficient distance to insure full protection when a train stops under circumstances in which it may be overtaken by another train.

In the year 1964, and in the years immediately prior thereto, the railroads within the Commonwealth of Pennsylvania began to make exceptions to this general rule in their operating rules, which exceptions were generally calculated to eliminate the requirement of full flag protection when trains were operating under locomotive cab, automatic block or manual block signal system rules.[1]

[1] Automatic block signals at fixed installations along the track give an indication of track conditions in the block or blocks ahead as a result of which engineers must stop or regulate their speed to conform to certain operating standards; locomotive cab signals give such indication continuously on a panel within the locomotive cab; manual block systems are controlled by operators at one or both ends of the block who advise engineers of conditions within the block.

The employees on the railroads of Pennsylvania, as indeed the employees on the railroads in many other states, were justifiably concerned that such changes to the long-established Rule 99 increased the risk of death or injury while they were in the performance of their duties. Consequently, in 1964 they brought the actions which culminated in an order by the Pennsylvania Public Utility Commission dated December 19, 1966, requiring that when a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and/or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail, and when necessary, in addition, display lighted fusees.[2]

This order was applicable to all of the railroads operating within the Commonwealth of Pennsylvania. It was sustained by the Pennsylvania Superior Court unanimously, both on the merits and on the question of federal pre-emption. The railroads of the Commonwealth then petitioned the Pennsylvania Supreme Court for review, which review was granted, but limited solely to the question of federal pre-emption, a question decided adversely to the railroads when raised by them in the Superior Court. The Pennsylvania Supreme Court on May 21, 1968 reversed both the orders of the Superior Court and the Pennsylvania Public Utility Commission on the ground that state jurisdiction had been completely pre-empted by Section 25 of the Interstate Commerce Act, 49 U. S. C. § 26, popularly known as the Railroad Block Signal System Act. The Co-Operative Legislative Committee, Railroad Brotherhoods

[2] This order is reproduced in full as Appendix VI to the Pa. P. U. C.'s Petition and found in the Supplemental Appendix at page 135.

in the State of Pennsylvania, was permitted to intervene by the Pennsylvania Superior Court and remained a party throughout the proceedings before the Supreme Court, which proceedings included the denial of the Petition for Reargument by the Supreme Court on July 15, 1968.

It is to be noted that no argument was made by the railroads that the order of the Pennsylvania Public Utility Commission, which had the effect of reinstituting the flagging rule within the Commonwealth, interfered with or was a burden upon interstate commerce. The record indicates that the reinstitution of the rule would have no economic impact upon the railroads nor did it require the employment of any additional personnel.[3]

The position of the employees throughout has been that manual flagging contributed to increased safety, both within and without manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories. They introduced evidence to the effect that, although much effort has been expended toward construction of automatic devices in such a manner that they "fail-safe",[4] false proceed indications occur at indefinite and indeterminate times. Indeed, the employees were and are so concerned for their own safety that they are willing to undertake the additional effort and responsibility required in performing manual flagging for their own safety and that of the public.

The railroads, in reply to the employees' contentions, argued primarily that the flagging requirements divided the responsibility for avoiding rear-end collisions between

[3] See Opinion of Pennsylvania Superior Court, Supplemental Appendix to Pa. P. U. C. Petition, page 92.

[4] "Fail-safe" refers to the indication by a signal of a more restrictive aspect in case of mechanical failure. "False proceed" refers to a failure resulting in a less restrictive aspect.

the flagman and the following engineer and reliance on flagmen lulls engineers into a false sense of security and thus creates a safety hazard. The railroads' contention that the elimination of flagging would result in safer operation was rejected by the Pennsylvania Public Utility Commission, and the Pennsylvania Superior Court found that it was legally justified in such rejection.

The Pennsylvania Public Utility Commission has filed a Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, and the Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, joins in such Petition. In order to minimize duplication, the Brotherhoods will not reiterate all of the facts and arguments set forth by the Pennsylvania Public Utility Commission in its Petition, but they accept and adopt them as their own.

The Reason for Allowing Certiorari

The Supreme Court of Pennsylvania has decided that the Congress of the United States by the enactment of Section 25 of the Interstate Commerce Act, effectively precluded state regulation requiring manual flag protection of trains against following movements on the basis that the mechanical devices specifically required by Section 25 perform the exact same function that manual flagging is intended to perform and that the language used in Section 25 must be construed to indicate that Congress has chosen to occupy the entire field to the exclusion of all state regulation.

This decision is directly contrary to the decision of the Supreme Court of New Jersey in *Pennsylvania Railroad Company et al. v. Board of Public Utility Commissioners*,

et al., 49 N. J. 174, 229 At. 2d 505, made on April 24, 1967 in an identical situation.[5]

Not only are the Supreme Courts of these two states diametrically opposed on the question involved herein, but the decision of the Supreme Court of Pennsylvania, if followed, would exclude state regulation of a field which the federal government has not seen fit to occupy.

Federal railroad safety regulations until April 1, 1967 were administered by the Interstate Commerce Commission and on that date became the responsibility of the Department of Transportation, Federal Railroad Administration. It is free from doubt that neither the Interstate Commerce Commission nor the Federal Railroad Administration believed, nor do they now believe, that they possess any statutory authority or obligation to enter the field. It is also abundantly clear that no regulations requiring flagging have been promulgated by the federal government.[6]

To allow the decision of the Pennsylvania Supreme Court to stand would deprive the states of jurisdiction in a field which Pennsylvania, Illinois, Maryland, Delaware and West Virginia have felt a need to enter. It would deprive the states of any jurisdiction to provide regulation in an industry which is extremely hazardous regardless of the emphasis placed on safety. It is an occupation where 166 employees were killed and 17,529 employees were injured in 1967. The decision of the Pennsylvania Supreme Court by a bare majority must not be allowed to become the basis for a lack of regulation leading to future injury and death. It is not in accordance with the deci-

[5] This Opinion is reproduced in Appendix I of this Petition.

[6] Letters from the Interstate Commerce Commission and the Department of Transportation so indicating are printed in this Petition as Appendices II and III.

sions of your Honorable Court dealing with the question of pre-emption and if allowed to continue as the law of Pennsylvania will create a permanent vacuum by excluding state authority in a field of safety in which the federal government has not as yet seen fit to act. It will result in unreasonable and unnecessary hazard, not only to railroad employees, but to the public generally. It is clearly erroneous and should be reversed.

ARGUMENT

Congress, in enacting Section 25 of the Interstate Commerce Act, did not preclude state regulation requiring protection of trains against following train movements for the reasons: Congress did not manifest an intention to do so; the state regulation does not, in its terms or in its administration, conflict with Section 25 or infringe upon its policy; and there is no sound basis under applicable principles to infer pre-emption.

It is not disputed that the state regulation on flagging does not contravene the commerce clause of the Federal Constitution and that it is not in conflict with any Federal Act or regulation. The issue, to which the Supreme Court of Pennsylvania limited its review, is whether Section 25 of the Interstate Commerce Act,[7] pre-empted state regulation dealing with flag protection.

The Court below, by a 4-3 divided opinion, held pre-emption by inference and gave three reasons in support of its finding:

> "First, there can be no doubt whatsoever that the mechanical devices specifically required by § 25 perform the *exact same function* that manual flagging is intended to perform (*i.e.*, increasing safety by prevent-

[7] 49 U. S. C. § 26.

> ing rear end collisions); second, the language used in § 25 is broad enough to indicate that Congress has chosen to regulate the entire field of rear end collision prevention; and third, the Supreme Court of the United States has announced the rule that where federal language is broad enough to indicate pre-emption, a state law cannot escape interdiction on the ground that it does not *conflict* with the federal regulations actually passed." (Pa. P. U. C. Petition Appendix I, page 48)

The Pennsylvania Supreme Court did not find any conflict between the federal act and the state regulation. It based its ruling on finding an intention on the part of Congress to occupy the entire field. The constitutional rule is, absent a conflict, that there must be a *clear manifestation of Congressional intention.* The distinction between "clear manifestation of intention' and the light, superficial inference indulged in by the Pennsylvania Supreme Court to find Congressional intent is obvious.

The Federal Statute is completely silent on the subject of flagging, so that a finding of pre-emption must be based on inference. But such inference can properly be made only by the satisfaction of certain basic tests.

The guiding principle for pre-emption by inference is well stated in *Southern Pacific Co. v. State of Arizona ex rel. Sullivan*, 325 U. S. 761, 766 (1945):

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, . . . or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."[8]

[8] The Southern Pacific case held, *inter alia*, that Section 25 of the Interstate Commerce Act, the same section as is here involved, did not pre-empt state regulation of train lengths.

To the same effect, although the thought is expressed in different words, is:

Florida Lime and Avocado Growers Inc. v. Paul, Director of Dept. of Agriculture of California, 373 U. S. 132, 142 (1963):

> ". . . The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.
>
> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[9]

In another case, *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.,* 372 U. S. 714, 772 *et seq.* (1963), the issue was the same as that here in that the carrier contended that, even without conflict, a state statute on the same subject as the federal statute was invalid. The Court rejected this contention, saying:

---

[9] *Cf.* the Pennsylvania Supreme Court's reliance on block signals and flagging being intended to perform same objective, the prevention of rear end collisions, and see Buck v. California, 343 U. S. 99 (1952) reh. den. 343 U. S. 932, municipal ordinance and federal regulation on the same subject were allowed to stand together, in the words of the Court (page 102):

> "As the ordinance is not in conflict with and may be construed consistently with the federal regulations, and in keeping with the latter's purpose, they may stand together . . .".

And also see Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440, 443 (1960):

> "In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.'"

"Continental argues that federal law has so pervasively covered the field of protecting people in interstate commerce from racial discrimination that the States are barred from enacting legislation in this field. It is not contended, however, that the Colorado statute is in direct conflict with federal law, that it denies rights granted by Congress, or that it stands as an obstacle to the full effectiveness of a federal statute. Rather Continental argues that:

'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'

"But this Court has also said that the mere 'fact of identity does not mean the automatic invalidity of State measures.' To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here."

* * *

"The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much of which has been exercised by regulations. Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938 and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the federal legislation."

The law as stated in all the above cases was applied by the Supreme Court of Illinois in a case where the preemptiveness of Section 25 of the Interstate Commerce Act was in question as in the instant case. The case reference

is *Central Illinois Public Service Co. v. Illinois Commerce Commission ex rel. Illinois Central Railroad Co.*, 18 Ill. 2d 506, 165 N. E. 2d 322 (1960). There the court rejected a contention that Congress, by virtue of Section 25, 49 U. S. C. § 26, had completely pre-empted the field of train-stop regulation; and found that the Illinois Commerce Commission, in requiring a conversion of the railroad's train-stop system from 60 cycle to 100 cycle current to immunize it from interference from current escaping from the Public Service Company's transmission line and causing false signals, was not invading a field completely pre-empted by Federal authority. The railroad in that case certainly was not making any contention of pre-emption. Indeed, it was the railroad's complaint to the Illinois Commerce Commission which instigated the litigation.[10]

The same guiding principle was applied by the New Jersey Supreme Court in *In Re Complaint of Brotherhood of R. R. Trainmen v. Public Utility Commissioners of New Jersey*, 49 N. J. 174, 229 A. 2d 505 (1967) on the exact issue here involved, namely, whether the state safety measure of flag protection was pre-empted by Section 25. The

---

[10] Illinois Central Railroad said in its brief before the Supreme Court of Illinois, page 38:

"It is now well settled that the State of Illinois (as well as the other sovereign states) has the inherent power to enact reasonable regulations for the protection of the health, safety and general welfare of persons within the confines, provided (1) that such regulations do not directly burden interstate commerce and (2) that such regulations are not in conflict with or repugnant to any action taken by Congress, *even though such regulations incidentally affect interstate commerce.*"

And on page 46 of the same:

"It is difficult to imagine or to even conjure up a state order or regulation which would be less in conflict with or less repugnant to action taken by Congress or its agencies than is the order in the instant case. The fact of the matter is the Commission's order of March 8, 1955 is *in aid of* interstate commerce and *in aid of* action taken by the agencies of Congress, as will be hereinafter demonstrated."

And on page 51:

"In view of the language in the foregoing cases, it is respectfully submitted that Congress has not occupied the field of signal regulation to the exclusion of the states and that the order in question does not directly burden interstate commerce and is not in conflict with nor repugnant to any action taken by Congress or its agencies."

New Jersey Supreme Court found no pre-emption. The Pennsylvania Supreme Court in a somewhat cursory manner refuses to follow the decision of the New Jersey Supreme Court.

The Pennsylvania Court relies heavily on the case of *Napier v. Atlantic Coast Line R. R. Co.*, 272 U. S. 605 (1926), which construed the Locomotive Boiler Inspection Act[11] as clearly indicating an intention by Congress to occupy the entire field of regulatory locomotive equipment:

In *Napier*, at page 611 this Court said:

> "Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U. S. 280. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.
>
> "'The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission . . .'"

And at page 613:

> "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy this field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose."

[11] 45 U. S. C. § 23, printed in Appendix IV hereto.

The New Jersey Supreme Court distinguishes this case by reference to the obvious need for national uniformity in the field of locomotive equipment.

A more cogent argument is thought to reside in the words of the Statute itself. The Boiler Inspection Act was extended in 1915 to include "the entire locomotive and tender and all parts and appurtenances thereof." It is all embracing and obviously indicates an intent to subject the entire locomotive and all its parts to federal regulation. Numerous regulations have actually been issued.

In contrast the Railroad Block Signal Act[12] refers to "block signal system, interlocking, automatic train stop, train control, and/or cab signal systems and/or other *similar*[13] appliances, methods or systems, intended to promote the safety of railroad operation." This Statute can only be construed as embracing manual flagging by following the tortuous and erroneous reasoning of the Pennsylvania Supreme Court.

The Pennsylvania Court first characterizes this statute as intended to prevent rear-end collisions rather than being intended to control the installation, inspection, maintenance and repair of block signal systems, interlocking devices, automatic train stops, train control, cab signal devices and *similar* appliances, methods or systems.

Not only does the use of the word "similar" argue against such construction, but also the legislative history[14] and any reasonable construction of the Act itself.

As Justices Cohen and Eagen said in their dissent, the statute uses the language "to install . . . upon the whole

---

[12] So entitled in Popular Name Tables.

[13] Italics ours.

[14] Reference is made to the Petition of the Pa. P. U. C. on this point, wherein at page 20 the legislative history is discussed.

or any part of its railroad."[15] Certainly a statute intended to cover all rear-end collisions would not be so geographically limited nor would an act intended to cover manual flagging use the word "install".

Likewise an Act intended to prevent rear-end collisions by any means including manual flagging would not require the inspection of such "apparatus, with its controlling and operating appurtenances" from time to time as does the Block Signal Act in its paragraph (e).[16]

When consideration is given to the consequences which would result from the decision of the Pennsylvania Supreme Court were it not reversed, it becomes all the more clear that the Pennsylvania Supreme Court has stretched inference to a point beyond that permitted by the applicable criteria, and would thereby create a vacuum wherein no state regulation would be lawful and no federal regulation has been authorized by Congress.

The inherent police power of the state must not lightly be brushed aside to leave a vacuum in which the public and the railroad employees are afforded no protection by either federal or state law. There is an abundance of precedent for this conclusion, and reference need only be made to 15 Am. Jur. 2d, Commerce Sec. 24, where it is said:

> "While it is agreed that the exercise of the state's police power must yield when it comes in conflict with an affirmative exercise by Congress of its power to regulate commerce, the intention of Congress to exercise its paramount authority to supersede or exclude state action is not lightly to be inferred, especially where the public safety and health are concerned."

[15] See Pa. P. U. C. Appendix III, p. 73.

[16] See Pa. P. U. C. Appendix III, p. 76.

In support of making its inference of pre-emption the Pennsylvania Supreme Court says that "there can be no doubt whatsoever that the mechanical devices specifically required by section 25 perform the *exact same function* that manual flagging is intended to perform (*i.e.* increasing safety by preventing rear-end collisions).[17]

Only in a very loose and very general sense does this statement have any accuracy. It definitely ignores some basic and substantial differences between the two systems. For example, a mechanical device cannot place a torpedo on a track which will give an audible alarm signal to a following train; nor can a mechanical signal system in poor visibility situations move itself to a point where it will become visible as can be done by a flagman who can move out of a foggy area to give a more sufficient warning; nor can a signal a far distance away be nearly as effective as a fusee burning on a track at a more advantageous position. Only a flagman on the track can do these things and afford the added protection essential to the safety of the public and railroad employees when a train stops under circumstances where it might be overtaken by another train.

On the other hand block signals can and do perform functions beyond the ability of flagmen. They indicate in the block or blocks ahead, the presence of trains, gaps in the rail caused by slides or washouts, or open switches.

Both mechanical devices and manual flagging may prevent rear-end collisions but they are *not* "similar" methods or systems.

The New Jersey Court indicates that the railroads there asserted that if they believed that the Board's order en-

[17] Pa. P. U. C. Petition Appendix I, page 48.

hanced the safety of rail operations in the slightest degree they would have "no grounds or reasons to oppose the order."

The regulatory bodies in both states found that manual flagging would contribute to safety. It was not "similar". It was something above and beyond the protection afforded by mechanical devices and in no way conflicted with them.

A mechanical failure may and does, in spite of every engineering effort, sometimes give a false proceed signal. When it does so, only extraordinary good fortune, in the absence of flagging, prevents injury or death.

The fact that manual flagging has been imposed or considered by the legislatures or regulatory bodies of at least seven states gives weight to the importance attached to it as a safety measure.[18] Certainly if it performed the "exact same function" as block signals it would not be needed.

The Pennsylvania Supreme Court found that the Interstate Commerce Commission had issued an order requiring flagging.[19]

The Court is referred in this connection to the letter of the Interstate Commerce Commission dated July 12,

---

[18] Other than Pennsylvania.
Delaware—Public Service Commission—Docket 440.
Illinois—Public Service Commission Case No. 5097.
West Virginia—West Virginia Public Service Commission Case No. 6024.
New Jersey—See Appendix I hereto.
Maryland—See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co., *et al.*, 248 Md. 530, 238 A. 2d 516.
Kansas—Statute: Protection of trains, engines and cars on main track by flagman. That when any train or trains, engines or cars are obstructing any main-line or other tracks that are being used for main-line purposes they shall be protected against approaching trains at all times regardless of the use of any manual or automatically controlled block system or signal, or any yard limit board, by a reliable and competent flagman with both visible and audible signals. (L. 1913, ch. 251, § 2; March 6; R. S. 1923, 66-245; Kansas Statutes Ann. ch. 66 § 245).

[19] Such order, No. 29543, is printed as Appendix V hereof.

1967[20] which itself construed its own order as not to require flagging but as being permissive only. In short, the order sets up certain procedures for the operation of block systems which include permission to allow passenger trains or opposing trains in a manual block occupied by another train *when* flagging is prescribed.

Similarly, the evidence of record strongly indicates that the railroads themselves did not consider manual flagging as being within the terms of the Block Signal Act. If embraced by the Statute the railroads should have filed their rules relative to flagging with the federal authorities when the Act was passed in 1937,[21] but they did not do so. Nor do they report failures of flag protection as required by Section 25(f). Never has the failure of a flagman to properly perform his duties been reported as a failure under the Block Signal Act.

Paragraph (c) of the Act[22] requires that any change in the rules, standards, and instructions therein provided for must not be made without Commission approval. Yet when the railroads made the modifications to the flagging rule that gave rise to this litigation they did not secure I. C. C. or D. O. T. approval. How can they now argue that they are within and without the Statute at the same time?

The federal government continues to refer to and accept railroad regulations issued by the Pennsylvania Public Utility Commission. In this connection, attention is invited to Railroad Accident Investigation Report No. 4135,[23] The Pennsylvania Railroad Company, October 4, 1967, issued June 28, 1968, by the U. S. Department of Transpor-

---

[20] Appendix II to this Petition.

[21] Pa. P. U. C. Petition Appendix III, page 74.

[22] Sec. 25c Pa. P. U. C. Petition Appendix III, page 74.

[23] See Appendix VI hereto.

tation, Federal Railroad Administration, Railroad Safety Board. The case involved a rear-end collision between two Pennsylvania Railroad freight trains near Huntingdon, Pa. on October 4, 1967, resulting in death to one, and injury to two, train-service employees. The Board found that the accident was caused by failure of the conductor and flagman of the preceding train to provide adequate flag protection against following trains, and the failure of the engineer and front brakeman to operate the following train in accordance with signal indications. On page 5 of the report, the Board makes reference to the regulation of the Public Utility Commission here involved[24] and, on page 8, found, *inter alia,* that the preceding train was moving under circumstances in which it could be overtaken by another train and without flag protection as required. There is no indication that the federal authorities found fault with the Pennsylvania regulation and the case is illustrative of the manner in which the block signal system and manual flagging complement each other.

Where the Pennsylvania Superior Court without dissent found no pre-emption; where three dissenting Justices of the Pennsylvania Supreme Court found no pre-emption; where the New Jersey Supreme Court and the Illinois Supreme Court found no pre-emption; where there is no conflict in the federal law and the state law; where other state regulatory bodies have flagging regulations; where the federal authorities have taken no action in conflict with the state regulation and indeed have recognized it; where a finding of pre-emption would create in the important area of public and employee safety a vaccum theretofore occupied by state regulation under its police power; where the history of the federal legislation and interpretation

[24] The operating rule in effect was that required by the Pennsylvania Commission prior to the remand from the Superior Court and the final order.

of the federal act show no intent to pre-empt the field; and where the other factors mentioned in this presentment and in the petition of the Pennsylvania Public Utility Commission do not support a finding of pre-emption; it is obvious that there has been no clear manifestation of Congressional intent to monopolize the field and that the Majority in the Pennsylvania Supreme Court decision has stretched "inference" to a degree which does violence to the Act of Congress by extending it far beyond its clear intent.

Conclusion

Certiorari should be granted in this case to correct an error of the decision of the Pennsylvania Supreme Court and to assure the highest judicial review in the determination of whether state regulation of flagging protection in the vital interest of the safety of the public and railroad employees is or is not barred by Section 25 of the Interstate Commerce Act. More especially is this so, where the Pennsylvania and New Jersey Supreme Courts have rendered directly opposite decisions.

Wherefore, it is respectfully requested that our Petition for Certiorari be granted and that the matter be set down for plenary consideration of the facts.

Respectfully submitted,

T. P. SHEARER,
1801 Grant Building,
Pittsburgh, Pa. 15219.

G. P. MacDOUGALL,
705 Ring Building,
Washington, D. C. 20036,
Attorney for Petitioner.

Appendix I

SUPREME COURT OF NEW JERSEY

No. A-52, September Term, 1966.

In the Matter of the Formal Complaint
of
BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN, etc., Alleging Unwarranted, Unreasonable and Unsafe Conditions, etc.

THE PENNSYLVANIA RAILROAD COMPANY and PENNSYLVANIA READING SEASHORE LINES,
Appellants,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS, DEPARTMENT OF PUBLIC UTILITIES and BROTHERHOOD OF RAILWAY TRAINMEN, *et al.*,
Respondents.

---

49 N. J. 174.
229 A. 2d 505

Argued February 13, 1967. Decided Apr 24 1967.

On appeal from the Board of Public Utility Commissioners.

Mr. Richard N. Clattenburg of the Pennsylvania Bar argued the cause for the appellants (*Messrs. O'Mara, Schu-*

mann, Davis & Hession, attorneys; *Messrs. Charles E. Mechem* and *William P. Quinn* of the Pennsylvania Bar, on the brief).

Mr. James M. Davis, Jr. argued the cause for the respondent Brotherhoods (*Messrs. Powell and Davis,* attorneys).

Mr. Alan B. Handler, First Assistant Attorney General, argued the cause for the respondent Board of Public Utility Commissioners (*Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney; *Mr. Avrom J. Gold,* Assistant Attorney General, and *Mr. William Gural,* Deputy Attorney General, of counsel).

The opinion of the Court was delivered by JACOBS, J.

Effective October 18, 1964, the Railroads made rule changes which included the elimination of flagging requirements in automatic block signal territory and in manual block signal territory when absolute block is in effect. Thereafter the Brotherhoods filed a complaint before the Board of Public Utility Commissioners primarily attacking the rule changes as not consistent with reasonable safety. After due hearings, a hearing examiner submitted a report with various recommendations including one that the pre-existing flagging requirements be reinstated. On January 12, 1966, the Board adopted the examiner's recommendations and entered an order which directed, *inter alia,* that the Railroads (a) "restore Rules 99 and 152 to the wording in effect prior to October 18, 1964, insofar as said wording pertains to protection by flagging"; and (e) "maintain headlights on each train in conformity with the applicable regulations of the Interstate Commerce Commission." The Railroads appealed to the Appellate Division and we certified before argument there.

The Railroads have long maintained block systems for regulating train movements so as to space trains properly and avoid collisions. A block is a length of track within defined limits and may be controlled manually or automatically. In the manual block system, permission to enter a block and advise as to whether it is clear is given by an employee, normally by a signal indication at the entrance to the block. In manual absolute block territory (Rule 316), the train is signaled to stop at the entrance of the block containing the preceding train, whereas in manual permissive block territory (Rule 317) it may be permitted to enter the block with speed restriction and warning as to the presence of the preceding train. In automatic block territory, signal indications as to the conditions in each block are given automatically. Electrical circuits in the rails detect the presence of trains and the signals at the entrances to the blocks are governed accordingly. Automatic block signals are so set up as to show the conditions of more than one block ahead. Where the block about to be entered contains a preceding train, the automatic signal is designated as "stop and proceed" which calls upon the engineer to stop and then to proceed with caution at restricted speed not exceeding 15 miles per hour.

In manual block territory, the employee may of course display a false signal which may contribute to a disastrous collision. The possibility of such human error is self-evident and was acknowledged by the Railroads during the hearings before the examiner. Similarly, in automatic block territory, there may be false signals resulting from mechanical or electrical failures and through the malfunction of safety devices. During the hearings, the Railroads introduced evidence as to the high degree of reliability of the automatic signal system. However, they acknowledged

that through the years there have been many failures in the operation of the automatic system but stressed that most of these resulted in more restrictive and therefore non-dangerous signals, rather than in "false-proceed" signals which would dangerously call for less restriction than warranted by the actual conditions. During the hearings, the Pennsylvania Railroad's Engineer, Signals and Catenary, testified that from 1955 to 1964 it reported to the Interstate Commerce Commission, false proceed failures on its entire system which ranged between 3 and 10 in number per annum. During the same period, 6 rear-end accidents occurred in New Jersey and in some of those the absence of flagging was reported as a possible cause.

Prior to October 18, 1964, Rule 99 directed that when a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals, "a sufficient distance to insure full protection," placing torpedoes and, when necessary, lighted fusees. A note stipulated that when operating under automatic block system rules, Rule 99 will have been complied with "when full protection is afforded against trains moving at restricted speed." The October 18th changes provided (1) that when trains are operating under automatic block system rules, "the requirements of Rule 99 do not apply for following movements on the same track," and (2) that when trains are operating under manual block system rules, "the requirements of Rule 99 will not apply for following movements on the same track when Rule 316 is in effect, except when required by train order or timetable instructions."

Several witnesses testified on behalf of the Brotherhoods to the effect that the elimination of the flagman removed an additional safety protection which was reasonably re-

quired. They referred to a relatively recent accident which might have been averted by proper flagging activity, and to various accident investigations which have disclosed rusty tracks and other equipment deficiencies likely to lead to failures in the automatic system. Several witnesses on behalf of the Railroads took the position that the elimination of the flagman would increase rather than decrease safety by placing full rather than divided responsibilty on the engineer. Mr. Rathvon, Manager of Operating Rules of the Pennsylvania, put the matter this way: "I think that by removing the flagman we have removed the temptation for the engineman to rely on still another signal after he had been given a signal that the track is occupied. I believe in this respect we have created a rule that will improve the safety of our operations significantly."

The hearing examiner, in recommending that Rule 99 be restored to its wording prior to October 18th insofar as it applied to protection by flagging, flatly rejected the position of the Railroads on the safety issue, noting that "it is evident that the signal systems both automatic and manual are not perfect, and that any means of maintaining a check on possible errors is desirable." He also rejected the change in Rule 152 which eliminated the flagman requirement in cases where trains crossed over to or obstructed other tracks, pointing out that it would remove any responsibility for protection from the train crew and would place it "solely upon the tower operator, who may be located many miles from the scene." He expressed the view that the elimination of the flagman requirement would be "a reduction in the safety of operation."

In its decision adopting the examiner's recommendations, the Board of Public Utility Commissioners referred not

only to the testimony before him but also to earlier investigations by the Board of railroad accidents which were found by it to have been caused by human, electrical or mechanical failures or by the failure of safety devices to produce expected results. *Cf. The Pennsylvania Railroad Co. v. Dept. of Public Utilities*, 14 *N.J.* 411, 427 (1954). The Board pointed out that consideration must be given "to the use of every reasonable, incremental safety measure available, for this may be the very margin needed to prevent a serious accident." It recognized that the use of flag protection may cause some delay to trains but concluded that the safety aspects of rear-end flagging outweigh that consideration and that through flagging "a human or mechanical failure otherwise of tragic consequence may be overcome." It did not accept the Railroads' contention that the elimination of rear-end flagging was actually a safety improvement but determined instead that the flagging requirements of Rules 99 and 152 should be reinstated as reasonably essential to the safety of the traveling public and railroad personnel.

The Railroads urge that the Board's order restoring the flagging requirements was not supported by substantial evidence in the record and was "an abuse of administrative discretion." The Board is expressly authorized by statute to impose reasonable safety requirements on railroads operating within New Jersey. *R.S.* 48:2-23; *R.S.* 48:2-25; *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra*, 14 *N.J.* at 425. *R.S.* 48:2-23 provides that the Board may require any public utility to furnish safe, adequate and proper service; and *R.S.* 48:2-25 provides that it may fix just and reasonable practices to be followed by any public utility. See also *R.S.* 48:2-13; *R.S.* 48:3-3. An order of the Board fixing safety requirements may be reviewed judicially but will not be upset where there was reasonable

basis for its entry. *R.S.* 48:2-46; *In re Greenville Bus Co.*, 17 *N. J.* 131, 137-38 (1954); *Penna-Reading Seashore Lines v. Bd. Pub. Utility Com.*, 13 *N.J. Super.* 540, 548-49 (*App. Div.*), affirmed 8 *N.J.* 85 (1951).

In the *Pennsylvania* case, 14 *N.J.* 411, this Court made observations which have pertinence here. We pointed to the high and continuing public responsibility of the Board to insure that railroads provide safe transportation; we indicated that the Board need not await the happening of an accident before it acts to compel an additional safety measure which it finds to be reasonably necessary for the protection of the public; and we noted that the value of certain precautionary requirements may be self-evident and not require affirmative proof. 14 *N.J.* at 430. Here, the Railroads seem to have placed the primary stress on the contention that the elimination of the flagging requirements would increase rather than decrease the safety of operations. And while several railroad employees expressed their opinions to that effect, they did not produce any significant factual documentations or any independent expert studies in support. It appears highly unlikely that properly trained engineers would lessen their caution or their attentiveness because the block signals were being supplemented by flagging. And it appears highly likely that properly conducted flagging would serve, at least to a degree, as a safety measure against the exceptional failures in both the automatic and manual block territories; indeed the warning potential afforded by suitable flagging, flares and the like, may be said, as in the *Pennsylvania* case (14 *N. J.* at 430), to be self-evident. In any event, the showing before us affords no sound basis for differing with the Board's finding that the flagging requirements had affirmative safety aspects which outweighed the minor costs and inconveniences incident to their reinstatement.

There is no doubt as to the constitutional power of our Legislature to impose reasonable safety requirements on railroads operating in New Jersey, provided there is no substantial interference with interstate commerce or intrusion into a field which Congress has occupied completely. See *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra,* 14 *N.J.* at 425; see also *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.,* 382 *U.S.* 423, 429, 15 *L.Ed.2d* 501, 505 (1966); *Florida Avocado Growers v. Paul,* 373 *U.S.* 132, 141-43, 10 *L.E.2d* 248, 256-67 (1963). The Railroads, while conceding that the Board's requirements are not in actual conflict with federal statutory or regulatory requirements, contend nonetheless that they are invalid (1) because Congress has "preempted" the field by its passage of Section 25 of the Interstate Commerce Act (49 *U.S.C.A.* § 26) and (2) because they impose "an unlawful burden on Interstate Commerce in violation of the Federal Constitution, Art. 1, Sect. 8."

On the issue of preemption the Railroads rely most heavily on *Napier v. Atlantic Coast Line R. Co.,* 272 *U.S.* 605, 71 *L.Ed.* 432 (1926) where the Supreme Court struck down state requirements for cab curtains and automatic doors to fire boxes, on the ground that the Congressional enactment manifested "the intention to occupy the entire field of regulatory locomotive equipment." 272 *U.S.* at 611, 71 *L.Ed.* at 438; see also *Southern R. Co. v. Railroad Commission,* 236 *U.S.* 439, 446, 59 *L.Ed.* 661, 665 (1915); *Pennsylvania R. Co. v. Public Service Commission,* 250 *U.S.* 566, 569, 63 *L.Ed.* 1142, 1145 (1919). *Napier* has never been applied as broadly as the Railroads contend (*cf. Terminal R. Asso. v. Brotherhood of R. Trainmen,* 318 *U.S.* 1, 4, 87 *L.Ed* 571, 576 (1943); *Southern Pacific Co. v. Arizona,* 325 *U.S.* 761, 766, 89 *L.Ed.* 1915, 1922 (1945)); in any event it dealt,

not with a supplemental local emergency safety device, such as flagging, but with equipment attached to the locomotive which passes through from state to state and with respect to which the national interest in uniformity is vital and paramount. Similarly, the very Congressional language (49 *U.S.C.A.* § 26(b)) points to the block signal systems themselves and to similar appliances where national uniformity is the concern rather than to local safety requirements which do not impair the design or sweep of the federal regulations. . .

In *Florida Avocado Growers v. Paul, supra,* the Supreme Court pointed out that federal regulation of a field in commerce should not be deemed preemptive of state power in the absence of persuasive reason—"either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. See, e.g., Huron Portland Cement Co. v. Detroit, 362 US 440, 4 Led2d 852, 80 S Ct 813, 78 ALR 2d 1294." 373 *U.S.* at 142, 10 *L.Ed.2d* at 257. And in *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co., supra,* the Supreme Court, in upholding a state full crew law as against a claim of preemption, noted that in the absence of Congressional legislation as to the number of crew members, "the States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public." 382 *U.S.* at 429, 15 *L.Ed.2d* at 505. Indeed, it may be said that state regulatory provisions having local safety as their objective are the least likely to be held preempted. See *Huron Portland Cement Co. v. Detroit,* 362 *U.S.* 440, 442-44, 4 *L.Ed.2d* 852, 855-56 (1960); *cf. Railroad Transfer Service v. Chicago,* ____*U.S.* ____, ____*L.Ed.2d* ____ (1967); see also *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra,* where we stated that we were not convinced "that

there is merit to the Pennsylvania's contention that Congress has occupied the field of automatic block signals to the total exclusion of any state safety requirements bearing thereon." 14 *N.J.* at 434.

We reject not only the Railroads' preemption contention but also their claim that the Board's restoration of the flagging requirements constituted an undue burden on interstate commerce. In *Southern Pacific Co. v. Arizona, supra,* the Supreme Court pointed out that much had been left to the states for the regulation of subjects of local state concern and that the significant matters were the "nature and extent of the burden" which the state's safety regulations imposed on interstate commerce, and the "relative weights of the state and national interests." 325 *U.S.* at 771, 89 *L.Ed.* at 1925. Insofar as the flagging requirements here are concerned, it may fairly be said that the local safety interest is great, the need for uniformity is slight, and the burden on interstate commerce is minimal. Indeed at the close of their brief, the Railroads assert that if they believed that the Board's order enhanced the safety of rail operations in the slightest degree they would have "no grounds or reasons to oppose the order." The Board, as the expert administrative body charged by the Legislature with primary responsibility in the field, has found that safety will be enhanced and the record furnishes no persuasive ground for a different judicial finding or a holding of unconstitutionality. See *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra,* where, after citing *California v. Thompson,* 313 *U.S.* 109, 113, 85 *L.Ed.* 1219, 1221 (1941) and other pertinent cases, this Court said:

> "Finally, the Pennsylvania contends that the order violates the Commerce Clause of the Federal Constitution. We are satisfied that it does not. The requirements of the order, to the extent sustained, do not substantially impair the free flow of commerce between

> the states or intrude onto any field occupied completely by Congress. They are simply local safety measures which are reasonably designed to protect the traveling public within our State. Their advantages in guarding against accidents appear substantial and their disadvantages, measured in the asserted terms of expense and inconvenience, appear insubstantial. We consider that they fall well within the controlling decisions, listed by Justice Stone in *California v. Thompson, supra,* which have sustained many state safety regulations of comparable nature." 14 *N.J.* at 437.

See also *Huron Portland Cement Co. v. Detroit, supra,* 362 *U.S.* at 443-45, 4 *L.Ed.2d* at 856-57; *Head v. Board of Examiners,* 374 *U.S.* 424, 428, 10 *L.Ed.2d* 983, 987 (1963); *cf. Terminal R. Asso. v. Brotherhood of R. Trainmen, supra,* 318 *U.S.* at 8, 87 *L.Ed.* at 578.

The attack by the Railroads on paragraph (e) of the Board's order involves different considerations than those presented by the reinstatement of the flagging requirements. That paragraph directed that the Railroads maintain headlights on each train in conformity with the applicable regulations of the Interstate Commerce Commission. The headlights are of course part of the railroad equipment which moves through from state to state and the federal commission has prescribed detailed regulations with respect to them. 49 *C.F.R.* § 91.231; see *Brown v. Chicago, R.I. & P. R. Co.,* 108 *F.Supp.* 164 (*N.D. Iowa* 1952). Here uniformity is a matter of prime consideration and there is no suggestion that the State agency could impose different headlight requirements. It has not sought to do so. The position of the Railroads is that the State agency has no power to adopt and enforce its own headlight requirements (even though they coincide with the federal regulations) and thereby burden them with procedures and penalties beyond those imposed by the federal agency. See *R.S.*

48:2-41; *R.S.* 48:2-42. Although earlier decisions may be referred to (*cf. Southern R. Co. v. Railroad Commission, supra,* 236 *U.S.* 439, 59 *L.Ed.* 661; *Charlestown & W. C. R. Co. v. Varnville Furniture Co.,* 237 *U.S.* 597, 59 *L.Ed.* 1137 (1915)), they should be considered in the light of recent reaffirmations of *California v. Zook,* 336 *U.S.* 725, 730, 93 *L.Ed.* 1004, 1010 (1949) where the Court held that "identity does not mean the automatic invalidity of State measures." See *Colorado Com. v. Continental Airlines,* 372 *U.S.* 714, 722, 10 *L.Ed.2d* 84, 90 (1963) where the Supreme Court noted that in order to hold that a "state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute." See *Florida Avocado Growers v. Paul, supra,* 373 *U.S.* at 142, 10 *L.Ed.2d* at 256.

We are not prepared to say that the Board could not under any circumstances adopt headlight regulations which coincide with the federal regulations, but are nonetheless satisfied that the record before us calls for vacation of paragraph (e) of the order. Though there was some testimony with respect to headlights, there was no suggestion that the Railroads were not willing to remedy quickly any headlight deficiencies called to their attention. There was no substantial evidence that there were actual violations of the federal regulations nor was there any finding of such violations either by the hearing examiner or by the Board itself. Indeed the only comment in the Board's decision was that improved headlights were being installed and that the record contained descriptions of various headlights but "no suggestion as to appropriate standards of construction or degree of brilliance." The Board's brief contains nothing addressed to the defense of the paragraph or by way of answer to the Railroads' attack on it. On the

particular showing before us we find no reasonable need or present occasion for paragraph (e) and it will be exscinded. See 60 *Harv.L.Rev.* 262, 265 (1946). Subject to that modification the Board's order is:

Affirmed.

Appendix II

INTERSTATE COMMERCE COMMISSION

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20423

July 12, 1967

THE PENNSYLVANIA R. R. CO.
RECEIVED
JUL 14 1967
LEGAL DEPT.
PHILADELPHIA, PA.

Richard N. Clattenburg, Esq.
General Attorney
Pennsylvania Railroad Company
1138 Transportation Center
Six Penn Center Plaza
Philadelphia, Pa. 19104

Dear Mr. Clattenburg:

This is in reply to your letter dated June 27, 1967, in which you refer to my letter of February 20, 1967, to Mr. Louis C. Carter, Esquire, Assistant Counsel of the Pennsylvania Public Utility Commission.

As you state, the Interstate Commerce Commission has never established comprehensive rules prescribing the cir-

cumstances under which flagging shall and shall not be performed. While Order No. 29543 provided for the movement of trains in an occupied block subject to flag protection, this was considered a permissive requirement to allow such movements. The Commission had not construed its action as including flagging as one of the safety appliances, methods, or systems covered by Section 25 of the Interstate Commerce Act.

As you are aware, the safety functions administered by the Interstate Commerce Commission were transferred to the Department of Transportation on April 1 of this year. At the time of the transfer, Order No. 29543 was still in effect. Since this matter is presently under the jurisdiction of the Department of Transportation, I am sending your letter and our file to Mr. A. Scheffer Lang, Federal Railroad Administrator, for his consideration and comments directly to you.

Very truly yours,

ROBERT W. GINNANE,
Robert W. Ginnane,
General Counsel.

Appendix III

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D. C. 20591

THE PENNSYLVANIA R. R. CO.
RECEIVED
AUG 1 1967
LEGAL DEPT.
PHILADELPHIA, PA.

July 31, 1967

Mr. Richard N. Clattenburg, General Attorney
The Pennsylvania Railroad Company
1138 Transportation Center
Six Penn Center Plaza
Philadelphia, Pa. 19104

Dear Mr. Clattenburg:

This is in connection with your letter of June 27, 1967, to Mr. Robert W. Ginnane, General Counsel for the Interstate Commerce Commission, relating to Order No. 29543 issued by the Commission dated June 17, 1947. Mr. Ginnane has forwarded your letter and his file in this matter to the Federal Railroad Administration, which now has jurisdiction in Order No. 29543, for consideration and comments to be forwarded directly to you.

This order in Docket No. 29543 is presently in effect and is operative.

The manner in which flag protection is provided is an operating matter over which we do not exercise jurisdiction.

Sincerely yours,

(Name illegible), for
H. R. LONGHURST,
Acting Director
Bureau of Railroad Safety

Appendix IV

BOILER INSPECTION ACT

§ 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659.

Appendix V

INTERSTATE COMMERCE COMMISSION ORDER NO. 29543

1. Install on that part or parts of its lines over which any passenger train is operated at a speed of 60 or more miles per hour, or any freight train is operated at a speed of 50 or more miles per hour, an automatic block-signal system which shall conform to the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, as herein amended, or a manual block system which shall conform to the following conditions:

A passenger train will not be permitted to the block when occupied by another train, except under flag protection; no train will be admitted to the block when occupied by an opposing train or by a passenger train, except under flag protection; and a train other than a passenger train will not be permitted to follow a train other than a passenger train into the block except when authorized by a train order, permissive signal, or prescribed form, and when such movement is so authorized, the following train must proceed prepared to stop short of a train or obstruction, but not to exceed 15 miles per hour. 268 I. C. C. 560-561; Docket No. 29543.

Appendix VI

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
RAILROAD SAFETY BOARD

RAILROAD ACCIDENT INVESTIGATION
REPORT NO. 4135

THE PENNSYLVANIA RAILROAD COMPANY
OCTOBER 4, 1967

Synopsis

On October 4, 1967, a rear-end collision occurred between two Pennsylvania Railroad freight trains near Huntingdon, Pa., resulting in death to one, and injury to two, train-service employees.

The accident was caused by failure of the conductor and flagman of the preceding train to provide adequate flag

protection against following trains and failure of the engineer and front brakeman to operate the following train in accordance with signal indications.

Location and Method of Operation

The accident occurred on that part of the Allegheny Division extending between View and Altoona, Pa., a distance of 117.2 miles. In the accident area this is a three-track line over which trains moving with the current of traffic on tracks No. 1 and No. 3, and either direction on track No. 2, operate by signal indications of an automatic block-signal system, supplemented by a cab-signal system. From the south, the main tracks are designated as No. 1 eastward passenger, No. 2 eastward freight, and No. 3 westward.

The collision occurred on track No. 2, 81.3 miles west of View and 2.1 miles east of Huntingdon. Ardenheim, a small community not shown in the timetable, is near the collision point.

An interlocking, designated as Hunt, is at Huntingdon. Semi-automatic signal 10L, is 1.9 miles west of the collision point. It is controlled by the Hunt interlocking operator and is the home interlocking signal for westbound trains approaching the interlocking on track No. 2.

Automatic signals 1981 and 2003, governing westbound movements on track No. 2, are 2.2 miles and 526 feet east of the collision point, respectively. These signals, and signal 10L, are of the position-light type and are mounted on signal bridges.

Details concerning the tracks, signals, carrier's operating rules and timetable special instructions, trains involved, damages and other factors are set forth in the appendix.

The accident occurred under foggy weather conditions, which materially restricted the view of the members of the train crew involved.

Description and Discussion

Extra 6314 West, a westbound freight train consisting of 3 diesel-electric units, 104 cars loaded with ore, and a caboose, left Enola Yard at Banks, Pa., 5.7 miles east of View, at 3:59 a. m. the day of the accident. About 30 minutes later, it entered track No. 2 at View and proceeded to the vicinity of Wall, 38.1 miles west of View, where it stopped because of sticking brakes. When the brakes were released, the train again proceeded westward at various speeds under forty miles per hour, passing Jacks, 10.9 miles east of Huntingdon and Hunt interlocking, at 7:12 a. m. It passed signal 1981 about ten minutes later, then approached signal 2003, the approach signal to signal 10L. As the train neared signal 2003, which displayed on Approach aspect, the Hunt interlocking operator radiotelephoned the engineer and advised him to approach signal 10L slowly, as that signal was displaying a Stop aspect due to a route having been lined within the interlocking for Extra 2353 East, an eastbound freight train, to enter track No. 1 via track No. 2. Soon afterward, Extra 6314 West passed signal 2003 and stopped on track No. 2 with the rear end 526 feet west of that signal and the front end 4,965 feet short of signal 10L, which the engineer was unable to see because of the foggy weather conditions. He stopped this distance short of signal 10L because of grade conditions which would facilitate restarting the train later. At 7:32 a. m., within a few minutes after Extra 6314 West stopped, and while it was standing on track No. 2, the rear of the train was struck by Extra 2352 West, 526 feet west of signal 2003 and 2.1 miles east of Huntingdon.

The conductor and flagman of Extra 6314 West were in the cupola of the caboose as their train passed Jacks. They said it was very foggy at this time, and estimated that the fog restricted their range of vision to about 500 or 600 feet. According to their statements, the train proceeded westward from Jacks at 23 or 25 miles per hour and reduced speed to about 15 miles per hour nearing signal 2003. They stated that as the train neared this signal they overheard the radio-telephone conversation between the engineer and the Hunt interlocking operator, but could not understand what was being said and thus were unaware that the train was going to stop short of signal 10L. They further stated that they did not drop any lighted fusees onto the track structure while their train was moving en route from View, or while it was reducing speed in preparation for the stop short of signal 10L. The conductor and flagman descended from the caboose cupola when the train stopped in the block of signal 2003 and short of signal 10L, and at this time Extra 2353 East was passing the caboose on track No. 1. About one minute later, according to his statements, the flagman alighted from the caboose with a red flag, torpedoes and fusees, to provide flag protection against following trains on track No. 2. The conductor said that soon afterward, when Extra 2353 East had passed and the flagman had proceeded about 300 feet to the rear of the caboose, he saw the headlight of Extra 2352 West approaching from the rear on track No. 2 and saw the flagman giving that train stop signals with his red flag. He further said the approaching train was about to pass signal 2003 at this time, and estimated that it was moving at 25 to 30 miles per hour. Realizing that the approaching train could not stop short of a collision, the conductor alighted from the caboose and ran to safety. Although the conductor said the flagman had gone back about 300 feet,

the flagman stated that he had proceeded only 20 feet to the rear of the caboose when he heard the conductor call a warning about the approach of Extra 2352 West. He further stated that he immediately started to give the approaching train stop signals with his red flag, but ceased giving these signals moments later upon realizing they could not be seen through the fog. He then started to light a fusee. Immediately afterward, however, the flagman realized a collision was inevitable and ran from the track structure without lighting the fusee. Moments later, the locomotive of the approaching train passed the point where the flagman left the track structure and struck the rear end of Extra 6314 West.

The front brakeman of Extra 2352 West was killed, and the engineer of that train was injured. The flagman of Extra 6314 West was slightly injured when he slipped and fell while running from the track structure.

The engineer of Extra 2352 West, the only surviving crew member on the locomotive of that train, could not be questioned at the time of the investigation due to his being hospitalized and the extent of his injuries. Representatives of the carrier, however, were permitted a brief interview with him at the hospital a few hours after the collision, and were able to obtain a few statements concerning his actions and observations en route to the collision point. The following two paragraphs are based on the carrier's report of that interview and other information developed during the investigation.

Extra 2352 West, a westbound freight train consisting of 3 diesel-electric units, 122 cars and a caboose, left Enola Yard at Banks at 5:06 a. m., the day of the accident. It entered track No. 2 at View at 5:43 a. m. Sometime later, apparently about 6:25 a. m., it passed Lewis, 9.4 miles west

of Wall, where it began to follow Extra 6314 West at a relatively short distance. In addition, it began to encounter wayside signals displaying Approach aspects, due to the preceding train occupying the blocks of the next signals in advance. As the locomotive passed each wayside signals displaying an Approach aspect, the cab signal in the control compartment displayed a corresponding aspect. The engineer reduced speed to somewhat under 30 miles per hour to comply with these signal aspects, and to avoid the necessity of stopping at a signal still displaying a Stop-and-Proceed aspect due to the preceding train having not yet moved westward out of its block. Thus, as Extra 2352 West proceeded in the block of a signal displaying an Approach aspect, the preceding train moved out of the block of the next signal in advance, resulting in the Stop-and-Proceed aspect displayed by that signal changing to Approach before the signal became visible through the fog to the engineer of Extra 2352.

After passing several wayside signals displaying Approach aspects, Extra 2352 West passed signal 1981, which also displayed an Approach aspect. This indicated to the engineer that signal 2003 was displaying a Stop-and-Proceed aspect, due to the preceding train not yet having moved out of its block. Unaware that the preceding train had stopped in the block of signal 2003, the engineer assumed that it would clear that block while his train was moving in the block of signal 1981 and that the Stop-and-Proceed aspect displayed by signal 2003 would change to Approach before the signal came into view through the fog. Thus, he took no action to reduce speed sufficiently to stop the train short of signal 2003, as required, if that signal displayed a Stop-and-Proceed aspect when it came into view. According to the engineer, the train was moving about 25 miles per hour and was closely approaching signal

2003 before that signal came into view through the fog and he then saw that it was displaying a Stop-and-Proceed aspect, instead of the expected Approach aspect. He and the front brakeman simultaneously saw the caboose of the preceding train standing on track No. 2 a short distance ahead. The engineer applied the train brakes in emergency and a few seconds later, before its speed was materially reduced, Extra 2352 West struck the caboose of the preceding train.

Rule No. 99 provides that when a train stops under circumstances in which it may be overtaken by another train, a member of the crew must go back immediately with flagging equipment a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees. When a train is moving under circumstances in which it may be overtaken by another train, a member of the crew must take such action as may be necessary to insure full protection. By night, or by day where the view is obscured, lighted fusees must be dropped off at proper intervals. A footnote states that this rule is not applicable for following movements on the same track when trains are operating under automatic block-signal system rules as in this case. However, a regulation of the Pennsylvania Utility Commission requires that, in the State of Pennsylvania, flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment, for trains moving on main tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circumstances in which they may be overtaken by following trains, in automatic block-signal territories and other specified territories. A footnote to this regulation provides that the requirements of flagging, insofar as protecting against follow-

ing trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed.

It is evident that as Extra 6314 West, the preceding train, was proceeding from Jacks to the point where it stopped in the block of signal 2003, it was moving under heavy fog conditions and circumstances in which it could be overtaken by another train, and that neither the conductor nor flagman took any action, as required, to provide protection against following trains. Had either the conductor or flagman dropped lighted fusees onto the track structure, as required under the circumstances, it is probable that Extra 2352 West, the following train, would have stopped to extinguish the fusees and would have then proceeded at reduced speed, prepared to stop short of a train or obstruction. Thus, the accident might have been averted. It is also evident, that full protection was not provided for the preceding train, as required when it stopped in the block of signal 2003 under foggy weather conditions and circumstances in which it could be overtaken by another train. Had the flagman gone back immediately with a lighted fusee as far as possible in the interval between the time his train stopped and the following train was observed to be approaching, the collision might have been averted or its consequences minimized.

Under the carrier's operating rules, when Extra 2352 West, the following train, entered the block of signal 1981, which displayed an Approach aspect, it was authorized to proceed at not exceeding 30 miles per hour prepared to stop at signal 2003. The train was required to stop short of signal 2003, which displayed a Stop-and-Proceed aspect. After stopping, it was authorized to proceed in the block of signal 2003 at restricted speed not exceeding 15 miles per hour prepared to stop short of a train or obstruction.

It is evident that Extra 2352 West was moving at excessive speed, under the prevailing fog conditions, as it proceeded in the block of signal 1981 and neared signal 2003, and that it was not prepared to stop short of signal 2003, as required, when the Stop-and-Proceed aspect displayed by that signal came into view. Thus, when the engineer first saw signal 2003 at a short distance through the fog, there was insufficient braking distance for the train to stop short of that signal or the preceding train, resulting in the collision.

Findings

1. While en route to the point where it stopped in the block of signal 2003, the preceding train was moving under circumstances in which it could be overtaken by another train and without flag protection as required.

2. After stopping in the block of signal 2003, the preceding train was not provided with full protection against following trains, as required.

3. Under the Approach aspect displayed by signal 1981, the following train was authorized to proceed in the block of that signal, prepared to stop short of signal 2003.

4. The following train proceeded in the block of signal 1981 at excessive speed under the existing conditions and was not prepared to stop short of signal 2003 as required, when that signal came into view.

5. The following train passed signal 2003, which displayed a Stop-and-Proceed aspect, without stopping as required, resulting in the collision.

Cause

This accident was caused by failure of the conductor and flagman of the preceding train to provide adequate flag protection against following trains, and failure of the engineer and front brakemen to operate the following train in accordance with signal indications.

Dated at Washington, D. C., this 28th day of June 1968.

By the Federal Railroad Administration
Railroad Safety Board

Bette E. Holt
Acting Executive Secretary

(SEAL)

(Appendix omitted.)

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 16 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 443 & 638

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner
v.
BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.

CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,
Petitioner
v.
BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.

On Petitions for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

SHELDON E. BERNSTEIN
Attorney for Railway Labor Executives' Association

Of Counsel:

BERNSTEIN, ALPER, KLAVAN & MANNES
818 – 18th Street, N. W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Interest of the Railway Labor Executives' Association	2
Question Presented	2-3
Reasons For Granting The Writ	3
I. State Rail Safety Regulations Complementing and Compatible With Federal Law Have Been Victimized By an Unrealistic Misapplication of the Supremacy Clause	3-5
II. The Error Below Is of No Mere Parochial Concern; Its Logic Endangers Considerable Local Law Complementing Unfortunately Limited Federal Rail Safety Measures	6
A. Existing Federal and State Railroad Safety Measures Are Wholly Inadequate	6-9
B. The Reasoning Below Might Well Be Relied Upon to Nullify Other Supplementary State Measures Concerned with Railroad Safety	9-12
Conclusion	12-13

CITATIONS

CASES:

Atlantic Coast Line R.R. v. *Georgia*, 234 U.S. 280, 287-291	13
Colorado Anti-Discrimination Commission v. *Continental Airlines*, 372 U.S. 714, 720-721	4, 5
N.Y., New Haven & Hartford R.R. v. *People of the State of New York*, 165 U.S. 628, 631-634	12
Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 779	10
Terminal Railroad Association of St. Louis v. *Brotherhood of Railroad Trainmen, et al.*, 318 U.S. 1, 4	11-12
The Pennsylvania Railroad Company and Pennsylvania Reading Seashore Lines v. *Board of Public Utility Commissioners, Department of Public Utilities and Brotherhood of Railway Trainmen, et al.*, 49 N.J. 174, 229 A.2d 505 (1967)	3

UNITED STATES CONSTITUTION: Page

Supremacy Clause (Article VI, Clause 2) 4, 5, 9, 12

STATUTES:

Accidents Reports Act (45 U.S.C. §§ 38-43) 6
Ash-Pan Act (45 U.S.C. §§ 17-21) 6
Locomotive Inspection Act (45 U.S.C. §§ 22-34) 6
Safety Appliance Act (45 U.S.C. §§ 1-16) 6, 10, 11
Signal Inspection Act (49 U.S.C. § 26) 6-7, 11

REGULATIONS:

49 C.F.R., 199.129 9
49 C.F.R. 231 10
49 C.F.R. 232 10
49 C.F.R. 294 10
Deering's Colo. Code, Public Utilities, § 706 9-10
114 Hurd's Ill. Stats. Annotated § 147 10
114 Hurd's Ill. Stats. Annotated §§ 144, 148 and 151 10
Pa. Public Utility Commission Railroad Regulations, Rule 2 10

MISCELLANEOUS:

Hearings Before the House Committee on Interstate and Foreign Commerce, 90th Cong., 2nd Sess. ser. 90-39 (1968) 6

p. 1 7-8
p. 8 6
pp. 57-58 10
p. 157 2
p. 405 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 443 & 638

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner
v.
BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.

CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,
Petitioner
v.
BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.

On Petitions for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In accordance with Rule 42.1 of the Rules of this Court, the Railway Labor Executives' Association, having the consent of the parties[1], files this brief in support

[1] The written consents of all parties have been lodged with the Clerk of this Court.

of the Petitions filed by the Pennsylvania Public Utility Commission and the Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylania, for issuance of a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in the above cause.

INTEREST OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION

The interest of this *amicus,* a voluntary association, derives from its status as the central representative body of 23 constituent railway labor organizations and its function, in such capacity, of advancing those interests which all railway labor shares in common. In that context, the Railway Labor Executives' Association has long been concerned with the problem of railroad safety and the development of programs and federal and state legislation and administration designed to reverse the ever increasing adverse safety picture.

QUESTION PRESENTED

In the view of the Railway Labor Executives' Association, the question presented here is whether the thirty-year-old Signal Inspection Act, which in terms and by administrative practice and interpretation[2] has been devoted solely to establishment of federal standards for mechanical signal devices to avoid train col-

---

[2] In addition to the pertinent matter set out in the Petition, the Court's attention is also called to a letter of May 22, 1964 addressed to a member of Congress by the Chairman of the Interstate Commerce Commission asserting ICC's lack of jurisdiction to require flagging procedures in lieu of radio as a means of protection in connection with track construction or maintenance. *Hearings, infra,* fn. 4, at p. 157.

lisions, can now, on the theory of preemption, be construed to nullify long-standing supplementary state regulatory measures for flag protection and related manual devices.

REASONS FOR GRANTING THE WRIT

I. STATE RAIL SAFETY REGULATIONS COMPLEMENTING AND COMPATIBLE WITH FEDERAL LAW HAVE BEEN VICTIMIZED BY AN UNREALISTIC MISAPPLICATION OF THE SUPREMACY CLAUSE

To avoid redundancy, the Railway Labor Executives' Association herewith adopts by reference the reasons and arguments for issuance of the writ advanced by the Pennsylvania Public Utility Commission and the Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania. In our view, those petitions amply demonstrate bases for issuance of the writ in that:

(1) The Supreme Court of Pennsylvania construed and applied the doctrine of preemption in a fashion repugnant to the federal constitutional intent so as to unduly restrict the proper exercise of the state's police powers:

(2) The Pennsylvania decision is in conflict with that of the highest court of a sister state[3];

(3) The Pennsylvania decision involves a misapplication of this Court's decisions on the doctrine of preemption; and

(4) That decision will have a major and adverse impact on other state regulatory measures designed to

---

[3] *The Pennsylvania Railroad Company and Pennsylvania Reading Seashore Lines* v. *Board of Public Utility Commissioners, Department of Public Utilities and Brotherhood of Railroad Trainmen, et al.*, 49 N.J. 174, 229 A.2d 505 (1967).

supplement the exercise of federal authority for the purpose of effecting railroad safety.

With respect to the error below, we would only add to the demonstrations of the petitions that the Supreme Court of Pennsylvania appears to have reasoned, from the inapposite law of physics, that two bodies of legislation cannot constitutionally occupy the same place at the same time. From this the Court concludes that, since Congress has legislated with regard to railroad signaling, albeit only mechanical signaling, the Supremacy Clause would outlaw any body of state law in the same general field of signaling even though concerned only with non-mechanical signaling. For purposes of the constitutional inquiry at hand, however. the reasoning depends upon whether the two sets of laws, federal and state, can *compatibly* operate within the same general field of activity or endeavor at the same time.

The Pennsylvania decision illustrates that questions whether state regulatory patterns burden interstate commerce or are foreclosed by exercise of federal power cannot be resolved by stereotype words and phrases. Resolution of such questions depends upon an individualized analysis of the totality of relevant circumstances, what this Court has described as "particularized inquiry". *Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U.S. 714, 720-721 (1963). Thus it is that while on the given facts of one case of alleged preemption "'. . . coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go,'" yet under other circumstances the "mere 'fact of identity does not

mean the automatic invalidity of state measures.'" *Colorado, supra,* 372 U.S. at p. 722.

As amply demonstrated by the petitions, "particularized inquiry" into the facts of this case suggests no discord between federal authority granted to regulate mechanical signaling devices and supplementary state authority regulating manual signaling. Indeed both harmoniously serve their common purpose of railroad safety; their dual existence accords with this Court's teaching that "To hold a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute." *Colorado, supra,* 372 U.S at p. 722.

It is questionable whether the court below was concerned with the question whether in fact the federal and state controls could result in a workable relationship or whether it postured the question of validity of the state action on potential frustration of the federal purpose. In any event, it appears to have assumed that federal supremacy could only be assured by lending distance between federal and state exercises of authority so that once the federal government had exercised *any* authority, no matter how limited that exercise and how broad the area of commerce involved, the state would be automatically foreclosed. The resulting *modus operandi* is almost as if the United States Constitution had thus been rewritten to assume a necessary incompatibility between *any* state and *any* federal regulation within the broad boundaries of any general area of commerce without regard to whether conflict between the two is actual or truly potential.

II. THE ERROR BELOW IS OF NO MERE PAROCHIAL CONCERN: ITS LOGIC ENDANGERS CONSIDERABLE LOCAL LAW COMPLEMENTING UNFORTUNATELY LIMITED FEDERAL RAIL SAFETY MEASURES

A. Existing Federal and State Railroad Safety Measures Are Wholly Inadequate.

Even without the strictures applied by the court below, there is an ever increasing problem of railroad safety in the United States, a problem which occasioned the 90th Congress to commence hearings on Federal Standards for Railroad Safety proposed by various bills that had been introduced into the Congress including an Administration measure denominated H.R. 16980. Copies of the record of those hearings[4] have been lodged with the Clerk of this Court.

As reflected by examination of the statutes and as testified to in the aforementioned hearings, the federal laws on the subject of railroad safety, presently administered by the Department of Transportation, "are limited in scope, designed many years ago to meet specific hazards." *Hearings,* fn. 4, at p. 8. In totality the federal statutes include: The Safety Appliance Act (45 U.S.C. §§ 1-16), providing for power brakes and certain other mechanical safety equipment on locomotives and trains; the Ash-Pan Act (45 U.S.C. §§ 17-21), essentially obsolete with the disappearance of coal fuel steam locomotives; the Locomotive Inspection Act (45 U.S.C. §§ 22-34), requiring that locomotives be safe to operate and not a danger to life or limb; the Accidents Reports Act (45 U.S.C. §§ 38-43), providing for federal investigation of serious railroad accidents and certain recording by the carriers; and the Signal

---

[4] *Hearings Before the House Committee on Interstate and Foreign Commerce,* 90th Cong. 2nd Sess., ser. 90-39 (1968).

Inspection Act (49 U.S.C. § 26), the statute which the court below held had preempted the regulatory area sought to be controlled by the particularized state law in question.

That existing federal railroad safety statutes are not intended to be all inclusive of the subject of railroad safety is evident from the fact that there is no existing federal statute or regulation covering such matters as freight houses and stations, train shops, grade crossings, health and sanitation, operating practices and procedures, emergency equipment on trains, tracks, roadbeds, tunnels and bridges, undercarriage of trains, rail yards, and track crew cars.

To supplement this episodic and limited federal concern with the broad problem of railroad safety, many of the states, acting under the police powers reserved to them, have adopted various safety measures affecting railroads. But even such supplementary state control is extremely spotty with only a handful of states having any type of broadly-based and effective regulatory patterns to aid in railroad safety. The law of most states is wholly inadequate to do the job.

The gross inadequacies of both federal and state law to meet the need for railway safety led to the initiation of the aforementioned recent congressional exploration of the overall problem. In opening those hearings on Federal Standards for Railroad Safety, the Chairman of the House Committee on Interstate and Foreign Commerce stated, on May 21, 1968:

> "This morning we come to railroad safety where for many years the Federal interest has been concerned only in a very limited way.
>
> "In the last few years there has been a steady increase in the number of railroad accidents. Five

> years ago it was said that part of this increase was attributable to a change in the statistical reporting requirements. But by 2 years ago when the report of the Bureau of Railroad Safety and Service of the Interstate Commerce Commission for fiscal year 1965 was issued, there could be no doubt that the increased number of railroad accidents was not a statistical fact but a most serious and grave situation." *Hearings,* fn. 4, at page 1.

Because, as indicated, limited existing federal laws were designed many years ago only to meet specific hazards then under consideration, it is not strange that only a small fraction of the causes for railroad accidents are within existing federal jurisdiction. In a letter to the Chairman of the House of Representatives Committee on Interstate and Foreign Commerce, the Chairman of the Interstate Commerce Commission wrote, under date of July 1, 1966, that:

> "To begin with, the report of the Committee does not acknowledge the Commission's limited jurisdiction in railroad safety operations. As our analysis indicates, approximately 97 percent of all accidents are attributable to causes over which we have no jurisdiction. The report leaves the connotation that there has been a deterioration in railroad safety as a result of our efforts since 1954. Our analysis indicates just the reverse since there has been approximately a 33 percent decline since 1954 in the number of accidents due to causes falling in the Commission's area of jurisdiction." *Hearings,* fn. 4, at p. 405.

Thus from the hearings on the subject of railroad safety already held by the 90th Congress—which, hopefully, are only the prelude to further exploration of

the subject in the next Congress—it has become abundantly clear:

(1) That existing federal statutory authority concerning railroad safety is antiquated, episodic in its reach, and intended only to relate to specific hazards which in years past had motivated Congress;

(2) That this limited federal authority potentially covers only approximately 3 or 4 percent of the causes for railroad accidents so that the remaining 96 or 97 percent of the causes for railroad accidents either must be covered by state law or not reached at all, and;

(3) That the total existing pattern of public law, both federal and state, is unable to control or abate the continuing year-by-year increase of railroad accidents.

These facts—the appalling juxtaposition of a rising accident rate and only limited federal resources to fight with—are pragmatic inducement for careful inquiry to assure that state police measures adopted for the safety of railroad workers and passengers are not lightly or loosely destroyed by unrealistic application of the Supremacy Clause.

B. The Reasoning Below Might Well Be Relied Upon To Nullify Other Supplementary State Measures Concerned With Railroad Safety.

On the books today there are many state statutes covering aspects of railway safety which are also covered by federal law. Yet the state statutes are not inconsistent with the federal statutes and, in general, serve the same intended safety purpose. For example, compare 49 C.F.R., 199.129, with Deering's Colo. Code,

Public Utilities, § 7606, on the subject of headlights on locomotives; 49 C.F.R. 231 with 114 Hurd's Ill. Stats. Annotated § 147, on the subject of handholds; 49 C.F.R. 232 with 114 Hurd's Ill. Stats. Annotated §§ 144, 148 and 151, on the subject of brakes and drawbars; 49 C.F.R. 294 and Pa. Public Utility Commission Railroad Regulations, Rule 2, on the subject of accident reporting.

The reasoning of the decision below might stultify the salutary efforts typified by these examples of attempts by the states, within their reserved police powers, to deal with a very real danger to the public and to reduce the safety hazards involved without substantial interference with interstate movement of trains or actual conflict with federal law. But see *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 779 (1944) and cases cited therein.

A very clear illustration of the potential impact of the holding below relates to a hazard to railroad trainmen about which testimony was given in the aforementioned congressional hearings. *Hearings,* fn. 4, at pp. 57-58. There an official of the Brotherhood of Railroad Trainmen testified that although federal law (the Safety Appliance Act) required that cars and locomotives be equipped with automatic couplers, that such couplers or drawbars be at a standard height above the roadway so that they might be uncoupled without the need of men going between cars and that grab irons or handholds be installed on the ends or sides of cars, the fact was that the task of coupling and uncoupling cars by trainmen is still among the most hazardous faced by railroad employees. The witness

noted that 8 men were killed and 1,017 injured in 1966 alone in performing such work. The witness explained that the danger arose in connection with manipulation of the uncoupling lever which, because unmentioned in the statute, was held to be beyond the control of existing federal administrative power for specifications of standards to govern the method of operating the uncoupling lever and attendant devices. The parallel of language and construction as between the Safety Appliance Act and the Signal Inspection Act are such that the decision below might foreclose efforts by the states through supplementary regulation to rectify this situation.

We have already noted that there are vast areas of railroad activity not presently reached by federal law which are principally responsible for the causes of railroad accidents. Is there a risk from conceptions like below that any efforts by the states to deal with problems in these areas might be held to be foreclosed because of impingement on an area within which the federal government has already acted, even though in a limited way which could not create a conflict as between state and federal law? Or suppose, instead of enacting overall legislation on railroad safety, the next Congress or future Congresses should determine merely to follow existing patterns by legislating from time to time only to meet specific hazards. Should that ensue and the decision below stands, a risk would arise that needed supplementary state legislation would be frustrated even though not in actual conflict with federal law nor in an area inherently requiring national uniformity. See *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad*

Trainmen, et al., 318 U.S. 1, 4 (1943); *Atlantic Coast Line R.R.* v. *Georgia*, 234 U.S. 280, 287-291 (1914); *N.Y., New Haven & Hartford R.R.* v. *People of the State of New York*, 165 U.S. 628, 631-634 (1896).

Moreover, decisions like that below if permitted to stand—without the compelling logic of facts showing actual conflict with federal law or purpose or destruction of an intended pattern of national uniformity—will certainly tend to discourage state legislatures and state regulatory bodies from attempting needed controls. In short, the reach of the decision below could impair or destroy existing and future efforts of the states to retard the growth of railroad accidents and to increase the potentials of railroad safety.

CONCLUSION.

The flagging required by the law of Pennsylvania imposes no extraordinary burden upon railroads in Pennsylvania in transit from one state to another; those requirements in no way frustrate nor are they incompatible with the design and purpose of the federal Signal Inspection Act. A determination that the state regulations are valid will leave the federal law inviolate and, at the same time, will permit the local exercise of police power for the safety of employees and passengers to serve its salutary purpose. Thwarting that exercise of local police power, and thus nullifying necessary safeguards to help reduce the mounting problem of railway safety, is based below upon an unreasonable and erroneous application of the constitutional requirement of federal supremacy. Accordingly, those flagging procedures should be sus-

tained by this Court's granting the Petitions for a Writ of Certiorari and reversing the decision below.

Respectfully submitted,

SHELDON E. BERNSTEIN
Attorney for Railway Labor Executives' Association

Of Counsel:

BERNSTEIN, ALPER, KLAVAN & MANNES
818 – 18th Street, N. W.
Washington, D. C. 20006

INDEX.

	Page
COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. Section 25 of the Interstate Commerce Act by Its Language Authorizes the Department of Transportation to Establish Flagging Requirements Where Found Necessary for the Safe Operation of Trains	4
B. Under Section 25 of the Interstate Commerce Act, the ICC and DOT Have Ordered the Railroads to Provide Flag Protection Where Deemed Necessary for the Safe Operation of Trains	6
C. Congress by Section 25 of the Interstate Commerce Act Intended to Grant to the Administering Federal Agency Exclusive and Plenary Power Over All Means of Spacing and Separating Trains to Avoid Train Collisions	8
D. The Decision Below Is in Accordance With the Principles Established by This Court	10
E. The PUC Orders in Fact Conflict With the Regulations and Requirements Established Under Section 25 of the Interstate Commerce Act	13
CONCLUSION	14
APPENDIX A—Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation, No. 29543, 268 I.C.C. 547, 560-561 (1947)	16

TABLE OF CITATIONS.

Cases: Page

Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation, 268 ICC 547 (1947) 6, 7

Baltimore & Ohio Ry. Co. v. Jackson, 353 U.S. 325 (1957) 8

Ex Parte No. 171, 278 ICC 267 (1950) 6

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957) 14

In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended, 251 ICC 453 (1942) 7

In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended, 293 ICC 765 (1954) 7

In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended, 298 ICC 503 (1956) 7

Napier v. Atlantic Coast Line RR Co., 272 U.S. 605 (1926) 10

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 12

Statutes:

Act of June 30, 1906, 34 Stat. 838, 45 U.S.C. 35 9

Act of March 4, 1907, 34 Stat. 1312 9

Act of May 27, 1908, 35 Stat. 325 9

Act of March 4, 1909, 35 Stat. 965, 45 U.S.C. 36137 9

Act of October 22, 1913, 38 Stat. 212 9

Act of February 28, 1920, 41 Stat. 456:

Section 1(21) 9

Section 441, 41 Stat. 497 10

Act of October 15, 1966, PL 89-670, 80 Stat. 937, 49 U.S.C. § 1655(e)(6)(A) 4

Interstate Commerce Act:

Section 25 (49 U.S.C. Sec. 26) 2, 3, 4, 5, 6, 8, 9, 10, 11, 13

TABLE OF CITATIONS (Continued).

Miscellaneous:

	Page
Federal Register of January 16, 1941, pages 452-453	7
4 Fed. Reg. 2146 (1939)	6
49 CFR, Part 136.1-136.838 (1958)	6
49 CFR § 136.23	13
49 CFR § 136.23(c)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

NOS. 443 AND 638.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.,

Respondents.

COOPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,

Petitioner,

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANA.

COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW.

1. Was not the Supreme Court of Pennsylvania correct in holding that Section 25 of the Interstate Commerce Act, dealing with regulation of "the block signal system, interlocking, automatic train stop, train control, and/or cab signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operations", completely occupies the field of the spacing and separation of trains to prevent train collisions and preempts all state regulation in this field, including flag protection?

STATEMENT OF THE CASE.

Respondents accept the statement of the case set forth in the Petition of the Pennsylvania Public Utility Commission (hereinafter "PUC") in No. 443 for the purposes of this Brief.

Respondents except to the assertion in the Petition in No. 638 at page 5, that no argument was made by them that the PUC orders were a burden on interstate commerce. That argument was presented to the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania allowed Respondents' appeal only on the question of preemption.

SUMMARY OF ARGUMENT.

The construction given Section 25 of the Interstate Commerce Act (49 U.S.C. Sec. 26) by the Supreme Court of Pennsylvania is compelled by the language of that section, its interpretation and application by the federal agencies charged with its administration, and by the intent of Congress, as evidenced historically, to regulate fully in the area of protecting against train collisions. This is an area where the purposes of the federal statute require uniformity. Furthermore, the orders of the PUC set aside by the Supreme Court of Pennsylvania are in conflict with the federal statute and obstruct the purposes thereof.

The decision below is in accordance with the principles established by this Court governing the preemption of state action by Congressional enactments.

ARGUMENT.

A. Section 25 of the Interstate Commerce Act by Its Language Authorizes the Department of Transportation to Establish Flagging Requirements Where Found Necessary for the Safe Operation of Trains.

Contrary to the assertions of Petitioners, the Department of Transportation[1] (hereinafter "DOT") does have power to require flag protection of trains to prevent collisions, either as a specification or requirement prescribed by the DOT in connection with the block signal system or other method or system, or as a separate system to provide a safety zone ahead of or in the rear of trains to prevent collisions. The DOT, in fact, has now adopted and continued in effect Interstate Commerce Commission (hereinafter "ICC") requirements for flag protection in connection with block signal systems, and in the light of the historical development of railroad signalling, and the purposes thereof, its prescription of flagging as a separate system of protecting trains against collisions, not in conjunction with any other system, is clearly authorized by the statute.

Even in the days when only one train moved on a railroad line, flagging was used to prevent collisions at crossings and to clear the track, and an employee preceded the train to provide a safety zone ahead of it. As soon as two trains moved on the same track, such a safety zone was needed ahead of or behind a train to guard against train collisions. So-called flagmen used signals such as colored flags, lamps and fuzees. Then other systems were devised to provide the safety zones needed to space and separate trains to avoid collisions. These included train orders, which

1. The powers conferred on the Interstate Commerce Commission by Section 25 of the Interstate Commerce Act were transferred to DOT effective April 1, 1967. Act of October 15, 1966, PL 89-670, 80 Stat. 937, 49 U.S.C. § 1655(e)(6)(A).

confined train movement to clear track or set up meeting points for trains; schedules whereby following trains were required to keep a specified number of minutes apart; allocation of trains into designated classes, with trains of inferior classes required to clear into sidings prior to the arrival of superior trains; and the use of timed fuzees to separate trains, the following train being required to stop until the fuzee burned out, thus maintaining the required time interval between trains. Flagging and all of these other devices, separately or in combination, were (and still are) used by railroads for the purpose of preventing train collisions.

The block system, now widely used, was introduced some 100 years ago. Under this system track is divided into lengths of defined limits, or "blocks", and a train is not permitted to enter a block without permission. This permission is obtained orally or in writing, from the aspect of a fixed signal operated either manually or by electric circuits, or by a manual signal such as a wave of the hand or of a colored flag. Depending on the particular form of block system in use, there may or may not be employees stationed at the entrance to blocks. The lengths of blocks vary from a normal one to two miles in automatic block system territory to possibly as many as thirty miles in manual block system territory. The block system, with its later refinements through automatic signalling, cab signals, and the use of train control and train stop equipment, became accepted as the principal and best system for the creation of the necessary safety zones ahead of or behind trains to prevent collisions.[2]

Section 25 of the Interstate Commerce Act (49 U.S.C. Sec. 26) specifically delegates to the DOT the power to require installation of block signal systems and other

2. It is obvious that present day heavy volumes of rail traffic, let alone operation of trains at high speeds ranging up to 150 m.p.h., would not be possible if the railroads still relied on flagging to create the safety zones needed to prevent train collisions.

similar appliances, methods, and systems intended to promote the safety of railroad operation, authorizes the DOT to issue all specifications and requirements necessary to effectuate such systems, and requires that no discontinuance or material modification of such systems be made without DOT approval. As has been clearly indicated, the use of flagging to create safety zones ahead of and behind trains is simply one of the systems adopted by the railroads either singly or in combination with other systems, to establish such safety zones to prevent train collisions. It is submitted, therefore, that the Supreme Court of Pennsylvania was entirely correct in its holding that Congress has delegated to the DOT full power over the use of flag protection by the railroads to provide safety of operation.

B. Under Section 25 of the Interstate Commerce Act, the ICC and DOT Have Ordered the Railroads to Provide Flag Protection Where Deemed Necessary for the Safe Operation of Trains.

The construction of Section 25 of the Interstate Commerce Act set forth above is reinforced by the manner in which that Section has been applied by the ICC and DOT. These agencies have consistently given a broad construction to their grant of power over systems used by the railroads to prevent train collisions. They have gone far beyond the control of mechanical devices used by the railroads for these purposes.

Regulations and requirements with regard to automatic block systems were first published in 4 Fed. Reg. 2146 (1939) and amended by orders issued in *Appliances, Methods and Systems Intended to Promote Safety of Railroad Operation,* 268 ICC 547 (1947) and in *Ex Parte No. 171,* 278 ICC 267 (1950).[3] These regulations and require-

3. As amended to date this order is set forth in 49 CFR, Part 136.1-136.838 (1958).

ments go far beyond mechanical specifications for installation and maintenance of the signals used; they go into almost every detail of train operation under automatic signal systems.

The ICC also has issued requirements with respect to the operation of trains under manual block signal systems, *including the requirement that flag protection be used under specified conditions.* Although proposed detailed rules for manual block systems published in the *Federal Register* of January 16, 1941, pages 452-453, were never adopted, flag protection requirements have been attached to orders issued in specific cases approving manual block system operation (*e.g., In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended,* 251 ICC 453 (1942); *In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended,* 293 ICC 765, 768 (1954); *In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended,* 298 ICC 503, 506 (1956)).

Even more significant is an order issued by the ICC in *Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation,* 268 ICC 547 (1947), applicable to all railroads in the United States, establishing requirements for manual block system operation including the establishment of a safety zone by flag protection whenever passenger trains are admitted to a block occupied by another train.[4]

---

4. A copy of the Commission's findings (268 ICC at pp. 560-561) is printed in Appendix A to this Brief, *infra,* p. 16. Copies of letters from ICC and DOT confirming the continued effectiveness of this order, are attached to the Petition in No. 638 as Appendices II and III (pp. 33 and 35). Although Petitioners attempt to dismiss the flag protection requirement as a "permissive requirement"

The ICC and DOT have therefore exercised the powers granted them by Congress to stipulate flag protection as a requirement in connection with the operation of block signal systems where those agencies found such supplemental protection necessary for the safe operation of trains.

Although neither the ICC nor DOT has issued specific requirements for flag protection in the absence of block signal systems,[5] it is submitted that the Pennsylvania Supreme Court correctly held that the federal agencies were granted the power to take such action as a part of the regulation of systems used by railroads to create safety zones ahead of and behind trains to prevent train collisions.

C. Congress by Section 25 of the Interstate Commerce Act Intended to Grant to the Administering Federal Agency Exclusive and Plenary Power Over All Means of Spacing and Separating Trains to Avoid Train Collisions.

The intent of Congress to give the ICC and DOT full and exclusive power to regulate this field of systems used by the railroads to prevent train collisions is shown not

(Petition in No. 638, at p. 18), it is still a fact that when a passenger train is admitted to a manual block occupied by another train, a safety zone created by flag protection must be provided. Petitioners would no doubt argue that since an individual need not drive an automobile, laws requiring operators' licenses simply contain "permissive requirements". It should be noted that ICC Order No. 29543 also requires the use of train orders or prescribed forms, and establishes speed restrictions, all for the purpose of preventing train collisions. Certainly the powers of the DOT under Section 25 of the Interstate Commerce Act are not limited to the installation, inspection and maintenance of mechanical devices, as Petitioners assert, but in fact cover all means necessary to protect against train collisions.

5. Past administrative inaction is not conclusive as to Congressional intent. See, *e.g., Baltimore & Ohio Ry. Co. v. Jackson*, 353 U.S. 325 (1957).

only by the broad language of Section 25 of the Interstate Commerce Act but also by the history of federal interest in the safety of train operation.

Congressional concern with the safety of train movements has been consistently demonstrated over a long period of time. Congress began to enact railroad safety statutes soon after the establishment of the Interstate Commerce Commission in 1887, passing laws requiring safety appliances and limiting hours of service. Congress also recognized the importance of developing and placing on the railroads adequate systems of spacing and separating trains to avoid collisions, and recognized that this was a matter of national concern. By its Act of June 30, 1906, 34 Stat. 838, 45 U.S.C. 35, Congress directed the ICC to investigate the use and necessity for block signal systems and appliances for the automatic control of trains. The Commission's report was submitted to Congress in February of 1907 and the continued interest of Congress in this safety area was evidenced by the Acts of March 4, 1907, 34 Stat. 1312; May 27, 1908, 35 Stat. 325; March 4, 1909, 35 Stat. 965, 45 U.S.C. 36-37; and October 22, 1913, 38 Stat. 212.

In conjunction therewith, the ICC repeatedly emphasized the need for regulation of railroad operations, from the safety standpoint, by the Federal Government. For example, in its 29th Annual Report (1915) the ICC stated that safety of railway travel depended upon uniformity in the codification and application of rules relating to the operation of trains and that such uniformity could only be obtained through federal legislation (page 56).

Ultimately, Congress responded to this clear federal interest by passage of the Transportation Act of 1920 (Act of February 28, 1920, 41 Stat. 456). Section 1(21) of this Act empowered the ICC to require railroads to provide safe and adequate facilities for performing its car service as a common carrier. Additionally Congress established

the forerunner of the present Section 25 of the Interstate Commerce Act by giving the ICC authority to require installation of automatic train stop or train control devices, or other safety devices (Section 441, 41 Stat. 497).

The present statute greatly expanded this authority, giving the ICC and DOT power not only over devices designed to stop trains but also over the block signal systems and all other systems of spacing and separating trains to prevent train collisions.

It is submitted that the persistent Congressional interest in the area of safe operation of trains without collisions and the expanded powers given to the federal agencies by the present Section 25 of the Interstate Commerce Act were correctly recognized and given proper weight in the decision of the Supreme Court of Pennsylvania when it found that Congress intended to and did grant to the federal agencies involved exclusive powers to regulate the systems used by railroads to prevent train collisions.

D. The Decision Below Is in Accordance With the Principles Established by This Court.

The Supreme Court of Pennsylvania in its opinion has applied to the facts and circumstances of this case, principles of constitutional construction fully in accordance with those enunciated by this Court. It has applied established principles which govern the question of preemption where the language of a federal statute is clear, the grant of power to the federal agency is general and complete, and the intent of Congress to give exclusive jurisdiction to the federal regulatory body is evident from the subject matter, the federal interest therein, and the need for uniformity which negatives the possibility of effective state regulation.

In support of its holding, the Court below cited *Napier v. Atlantic Coast Line RR Co.*, 272 U.S. 605 (1926). The

constitutional basis for that decision is as firm today as when the decision was handed down. When Congress has shown its intention to occupy fully a field of regulation of interstate commerce, supplemental state regulation is invalid, even where it does not conflict with existing federal regulations or where its purpose is different from that of the federal statute.[6]

Given the intent of Congress to fully regulate the field of protection of trains against collisions through delegation of powers to the DOT, there is no conflict with the decisions of this Court which Petitioners have cited. This is not a case where there is a "gap" in the powers granted which leaves room for state regulation, nor is it a case where the subject matter is such that concurrent state regulation can be tolerated.

Petitioners argue for an unwarranted and limited construction of Section 25 of the Interstate Commerce Act, in an obvious effort to limit the powers granted by the Congress to DOT to "mechanical devices" fixed at specific railroad locations which do not cross state borders. Such a limited construction of Section 25 is contrary to its language and to its application by the DOT. Railroad operating rules necessarily affect employees and trains moving between states, and the perils involved in conflicting state regulations and the need for federal regulation, if any regulation is required, are obvious.

This is not a matter involving a dominant, persistent state interest, nor one involving peculiar local safety conditions which vary from state to state. Since train crew members may pass through as many as three or four states in a day in the operation of a single train, the necessity that the

6. In the instant case, as will be shown *infra*, the PUC orders were directed to the same purpose as the federal statute, and also conflicted with the requirements established by the federal agencies, thus obstructing the Congressional purpose.

employing railroad have a single uniform code of basic operating rules applicable in all states is self-evident, from the standpoint of safety and efficiency.[7] This is recognized by DOT in its specifications for block systems; the need for uniformity in the systems used by a railroad to space and separate trains is shown by the DOT requirement that all signal aspects on a given railroad, wherever it may operate, must have a uniform meaning. 49 CFR § 136.23(c).

Although operating rules necessarily allow for variance based on physical and other operating characteristics directly related to the movements of the trains, variances based solely on the location of state borders are totally illogical and create only additional hazards to safety of operation. It is evident that this is a field which Congress recognized as one of "those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority". *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 767 (1945).

The orders of the PUC which were stricken by the Supreme Court of Pennsylvania go to the heart of the matter which Congress has properly entrusted to DOT—the field of protection of trains against collision with other trains. The PUC would require all railroads to maintain in Pennsylvania, for all trains, the earliest system of protection against collisions devised in the history of railroad operation, whether or not the railroads, at the same time,

7. Already a number of states have adopted different flagging requirements, as shown at pages 41 to 43 of the Petition in No. 443, New Jersey simply restored the *status quo* prior to the railroads' 1964 rule changes. Pennsylvania required flagging on all tracks, including many where it had never been required or had been long abandoned, and Maryland required it only under unusual circumstances (requirements consistent with existing railroad practices). Delaware accepted the railroads' elimination of flag protection.

employ the newer systems of protection mandated or approved by the DOT. The PUC has thus invaded an area of dominant federal interest, where the Congress has entrusted full power to the DOT. Rejection of this action by the Court below followed inevitably from the application of the principles firmly established by this Court.

E. The PUC Orders in Fact Conflict With the Regulations and Requirements Established Under Section 25 of the Interstate Commerce Act.

Contrary to Petitioners' assertions, the PUC orders with regard to flag protection do conflict with outstanding orders of the DOT and for that reason alone must fall.

For example, DOT Order No. 29543 (See Appendix A to this brief, p. 16, *infra*) provides that where a train other than a passenger train is permitted to enter an occupied manual block, the protection of "train order, permissive signal, or prescribed form" must be employed, together with a speed limitation to ensure that the train can stop short of a train or obstruction. Flag protection is not here required, as it is in the same paragraph of the order where a passenger train is to be permitted to enter an occupied manual block. This can be regarded only as an application of the expertise of the federal agency under the powers delegated by Congress in the field of protection of trains against collisions, resulting in the conclusion that where other than passenger trains are involved, means of protection other than flagging are either better or are sufficient to effectuate the purposes of the statute.

The PUC orders of November 22, 1965 (Petition in No. 443, pp. 9-10) and December 19, 1966 (Petition in No. 443, pp. 11-15) both require flagging in this situation, contrary to the federal determination.

Another example is evidenced by consideration of the rule promulgated at 49 CFR § 136.23, discussed *supra* at

p. 12, requiring uniformity in the meaning of signal aspects throughout the lines of a railroad. Most railroads, in automatic block signal system territory, use a "stop-and-proceed" aspect at the entrance to an occupied block. The engineer must first stop his train, but may then proceed at limited speed, prepared to stop within his range of vision. The safety zone behind the train in advance starts at the stop-and-proceed signal. Where Pennsylvania, or any other state, imposes a flagging requirement in this situation, the meaning of the signal aspect is affected, because the engineer is led to expect that by virtue of the state regulation there is an additional and secondary safety zone, marked by a man with a flag or fuzee, to be reached before he encounters a train or obstruction. Thus the signal aspect gives a different meaning to the engineer in a state requiring flagging than in the state where no such requirement exists.

It is submitted, therefore, that the attempted regulation of the spacing and separation of trains by the PUC does in fact conflict with and obstruct the effectiveness of existing federal regulation in the same field, and for that reason alone the holding of the Supreme Court of Pennsylvania is correct. Petitioners themselves do not contend that where such conflict exists state action can be sustained.

CONCLUSION.

The decision below creates no "vacuum" in an area of railroad safety, because the federal agencies have the power, in controlling the systems of separating and spacing trains to avoid collisions, to specify and require the use of flagging, as well as train orders and other devices, where necessary for safety of operation.[8] The decision is limited

8. This Court has held that in instances where, as here, Congress has meant to reach to the full extent of its power under the Commerce Clause, thus invalidating state action, even the existence of a no-man's land has no significance. *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (1957).

to one particular aspect of state entrance into the federal area, and does not extend to all state statutes or regulations intended to protect the employees and property of the railroads or the public.

Congress has given the DOT full power to control and specify the systems used by the railroads to space and separate trains to avoid collisions and thus provide safe train operation. These systems include flagging, and the power to require flagging has been exercised under the Congressional grant. The need to approach and regulate this field of prevention of train collisions on a national basis, rather than state-by-state, has long been recognized and the field involves no peculiar local concern of the states. The action here attempted by Pennsylvania conflicts with existing federal regulation and policies and obstructs effectuation of the Congressional purpose.

Respondents respectfully request that the Petitions for Certiorari in Nos. 443 and 638 be denied.

Respectfully submitted,

RICHARD N. CLATTENBURG
Counsel for Respondents

Of Counsel:
BLAIR S. MCMILLIN
WILLIAM P. QUINN
DONALD A. BRINKWORTH
D. F. DONOVAN
RENÉ J. GUNNING
HARRIS J. LATTA
GORDON E. NEUENSCHWANDER
JOHN F. REILLY
ROBERT O. SMITH, JR.
THOMAS J. SMITH, JR.

APPENDIX A.

Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation, No. 29543, 268 I.C.C. 547, 560-561 (1947):

FINDINGS.

We find that in order to promote safety of railroad operation it is necessary in the public interest to require each respondent to—

1. Install on that part or parts of its lines over which any passenger train is operated at a speed of 60 or more miles per hour, or any freight train is operated at a speed of 50 or more miles per hour, an automatic block-signal system which shall conform to the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, as herein amended, or a manual block system which shall conform to the following conditions:

A passenger train will not be permitted to the block when occupied by another train, expect under flag protection; no train will be admitted to the block when occupied by an opposing train or by a passenger train, except under flag protection; and a train other than a possenger train will not be permitted to follow a train other than a passenger train into the block except when authorized by a train order, permissive signal, or prescribed form, and when such movement is so authorized, the following train must proceed prepared to stop short of a train or obstruction, but not to exceed 15 miles per hour.

2. Install on that part or parts of its lines over which any passenger or freight train is operated at a speed of 80 or more miles per hour an automatic train-stop or train-control system or automatic continuously controlled cab-signal system which shall conform to the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, as herein amended.

We further find that the definition of "medium speed" in the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, should be amended to read as follows:

Medium speed.—A speed not exceeding one-half authorized speed, but not exceeding 30 miles per hour.

We further find that the rules, standards and instructions prescribed by the order of the Commission of April 13, 1939, should be amended to include the following definition:

Low (restricted) speed.—A speed that will permit stopping short of another train or an obstruction, but not exceeding 15 miles per hour.

An appropriate order will be entered.

UPREME COURT, U. S.

FILED
DEC 18
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1968
No. 443

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
THE PENNSYLVANIA RAILROAD COMPANY,
LEHIGH VALLEY RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
THE DELAWARE AND HUDSON RAILROAD CORPORATION,
READING COMPANY,
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
WESTERN MARYLAND RAILROAD COMPANY,
ERIE LACKAWANNA RAILROAD COMPANY,
MONTOUR RAILROAD COMPANY,
THE MONONGAHELA RAILROAD COMPANY,
PITTSBURGH, CHARTIERS & YOUGHIOGHENY RAILWAY COMPANY,
Respondents

PETITION OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR REHEARING AND RECONSIDERATION OF ORDER OF DECEMBER 2, 1968, DENYING PETITION FOR CERTIORARI UNDER RULE 58

WILLIAM A. GOICHMAN
Assistant Counsel
EDWARD MUNCE
Acting Counsel
For Pennsylvania Public Utility Commission

127 North Office Building
Harrisburg, Pennsylvania 17120

Murrelle Printing Company, Law Printers, 901-903 Locust Street, Sayre, Pa.

TABLE OF CONTENTS

	Page
Petition of the Pennsylvania Public Utility Commission for Rehearing and Reconsideration of Order of December 3, 1968, Denying Petition for Certiorari Under Rule 58	2

TABLE OF CITATIONS

Cases:	
Angel v. Bullington, 330 U.S. 183, 189, 190, 67 S. Ct. 657, 91 L. Ed. 832 (1947)	3
Burford v. Sun Oil Co., 319 U.S. 315, 334, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)	3
Georgia v. Chattanooga, 264 U.S. 472, 484, 44 S. Ct. 369, 68 L. Ed. 796 (1923)	3
Martin v. Creasey, 360 U.S. 219, 225, 79 S. Ct. 1034, 3 L. Ed. 2d 1186 (1959)	2
Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 248, 73 S. Ct. 236, 97 L. Ed. 291 (1952)	3
Statute:	
Section 25 of the Interstate Commerce Act	4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 443

Pennsylvania Public Utility Commission,
Petitioner

v.

Bessemer and Lake Erie Railroad Company,
The Pennsylvania Railroad Company,
Lehigh Valley Railroad Company,
The New York Central Railroad Company,
The Baltimore and Ohio Railroad Company,
The Delaware and Hudson Railroad Corporation,
Reading Company,
The Central Railroad Company of New Jersey,
The Pittsburgh and Lake Erie Railroad Company,
Western Maryland Railway Company,
Erie Lackawanna Railroad Company,
Montour Railroad Company,
The Monongahela Railroad Company,
Pittsburgh, Chartiers & Youghiogheny Railway Company,
Respondents

PETITION OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR REHEARING AND RECONSIDERATION OF ORDER OF DECEMBER 3, 1968, DENYING PETITION FOR CERTIORARI UNDER RULE 58

To the Honorable the Justices of the Said Court:

The Petition of the Pennsylvania Public Utility Commission respectfully represents:

1. That on December 3, 1968 Your Honorable Court denied our Petition for Certiorari to the Supreme Court of Pennsylvania;

2. That in the hope that Your Honorable Court may review the Petition once again and find that Certiorari should be granted, as has been known to happen in the past, this Commission respectfully files this Petition for Reconsideration;

3. That Your Honorable Court has promised in many cases that:

> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here."
>
> *Martin v. Creasey,* 360 U.S. 219, 225, 79 S. Ct. 1034, 3 L. Ed. 2d 1186 (1959).

"Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right."

Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 248, 73 S. Ct. 236, 97 L. Ed. 291 (1952).

"If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review."

Georgia v. Chattanooga, 264 U.S. 472, 484, 44 S. Ct. 369, 68 L. Ed. 796 (1923).

"On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here."

Burford v. Sun Oil Co., 319 U.S. 315, 334, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

"Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court . . . He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong."

Angel v. Bullington, 330 U.S. 183, 189, 190, 67 S. Ct. 657, 91 L. Ed. 832 (1947).

4. That a failure to review the decision of the Supreme Court of Pennsylvania in this case is tanta-

mount to a declaration that that decision is correct and that the States no longer have any right to regulate flagging within their borders;

5. That such a holding invalidates the laws of a half dozen or more States which have regulated flagging for scores of years;

6. That the issue is not so clear or certain that these States through the means of this case should be deprived of a hearing in their defense;

7. That the decision of the Supreme Court of Pennsylvania does create a no-man's land where in the very vital field of safety since States are precluded from providing for flagging in areas on the railroad tracks where no block signal system is operative, and where, admittedly, the I.C.C. under Section 25 would have no authority to act;

8. That for the reason alone that the decision of the Pennsylvania Supreme Court decision is too broad, review should be had to spell out the rights of the States with regard to flagging vis-a-vis the federal government;

9. *That respectable opinion exists,* as evidenced by the fact that the decision of the Supreme Court of Pennsylvania in this case was a bare 4-3 majority, that the decision of the Superior Court of Pennsylvania was 7-0 in favor of the P.U.C.'s position, that the Supreme Court of New Jersey ruled in favor of the P.U.C.'s position, that a great number of learned jurists are also of the same opinion, *that Section 25 of the Interstate Commerce Act does not preempt State action* in the field of flagging;

10. That this is an important and significant case and one in which the States are entitled to be heard before their reserved powers in this important area are buried forever;

11. That the law reviews of the Dickinson Law School and the Utah University School of Law are preparing law review articles which should be printed within the next several weeks which thoroughly discuss this case and, upon information and belief, counsel avers that these articles conclude that the decision of the Pennsylvania Supreme Court is erroneous.

Wherefore, your petitioner prays Your Honorable Court, after reading this Petition and the Petition for Certiorari, to grant this Petition for Reconsideration and grant the Petition for a Writ of Certiorari,

And it will ever pray, etc.

Respectfully submitted,
WILLIAM A. GOICHMAN
Assistant Counsel
EDWARD MUNCE
Acting Counsel
For Pennsylvania Public Utility Commission

CERTIFICATE

The undersigned, a member of the Bar of the Court, certifies that this Petition of the Pennsylvania Public Utility Commission for Rehearing and Reconsideration of Order of December 3, 1968, Denying Petition for Certiorari under Rule 58 is presented in good faith and not for the purpose of delay.

WILLIAM A. GOICHMAN
Assistant Counsel